Supreme Court, U.S.
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92-278

Case No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

RONALD L. BRANSON,

Petitioner,

vs.

COUNTY OF LOS ANGELES,
SHERMAN BLOCK,
JAMES PEREZ,
DWIGHT SMITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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July 27, 1992

Resubmitted: August 10, 1992

8 6pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner herein is referred to as "plaintiff."

(1) Whether the Court of Appeal was required to address the Request for Entry of Default against defendant DWIGHT SMITH on appeal (No. B052261) and failed to do so, and thereby deprive plaintiff of liberty and property ***without due process of law***; and in this connection whether Code of Civil Procedure §418.10(a)(1) is unconstitutional as applied to plaintiff.

(2) Whether the Court of Appeal was required to address the Ruling on Demurrer involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ on appeal (No. B053009) and failed to do so, and thereby deprive plaintiff of liberty and property ***without due process of law.***

(3) Whether the Court of Appeal was required to address the CCP §581(f)(2) Dismissal against defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ on appeal (No. B053009) and failed to do so, and thereby deprive plaintiff of liberty and property ***without due process of law.***

(4) Whether the Court of Appeal was required to keep Appeal No. B052261 against defendant DWIGHT SMITH separate and distinct from Appeal No. B053009 against defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ and failed to do so, and thereby deprive plaintiff of liberty and property ***without due process of law***; and in this connection whether Code of Civil Procedure §904.1 subdivision (a) and subdivision (c) are unconstitutional as applied to plaintiff.

(5) Whether the Court of Appeal was required to address the issue of Disqualification of the Trial Judge on appeal (No. B053009) and failed to do so, and thereby deprive plaintiff of liberty and property ***without due process of law***; and in this connection whether Code of Civil Procedure §170.4(b) is unconstitutional as applied to plaintiff.

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REFERENCE TO OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS

United States Reports
Supreme Court Reporter
Federal Reporter, 2d Series
California Supreme Court Reports, 2d & 3d
California Appellate Reports, 2d & 3d
California Reporter
Pacific Reporter, 2d Series

GROUNDS FOR JURISDICTION

(1) The final opinion sought to be reviewed was filed February 19, 1992; rehearing was denied March 10, 1992; review by the State Supreme Court was denied April 29, 1992.

(2) The statutory provision believed to confer on this Court jurisdiction to review the final state opinion in question by writ of certiorari is Title 28 U.S.C. §1257(a). [Text in Appendix].

TITLE 28 U.S.C. §2403(b) MAY BE APPLICABLE

The constitutionality of several State statutes is drawn into question and therefore Title 28 U.S.C. §2403(b) may be applicable; this Petition is served upon the Attorney General of California.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:
Fifth Amendment, U.S. Constitution
Fourteenth Amendment, U.S. Constitution
Art.I, Sec.7(a), California Constitution
Federal Statutes:
28 U.S.C. §1257(a); 28 U.S.C. §2101(c)
California Statutes:
Code of Civil Procedure:
§§20, 170.1(a)(6)(C), 170.3(c)(1), 170.3(c)(4), 170.3(c)(5), 170.4(b), 187, 418.10(a)(1), 581(f)(2), 583.410, 583.420(a)(2)(A), 585(b), 904.1(a), 904.1(c)
Evidence Code:
§§452, 453, 459
[Pertinent texts are set forth in the Appendix.]

STATEMENT OF THE CASE

The following facts are material to the consideration of the questions presented. The pertinent quotations of portions of the record relied upon (by reference to "APP") are included in the APPENDIX under the heading "Pertinent Quotations of Specific Portions of Record." [USSC Rule 14.1(h)].

(1) The issue of the Request for Entry of Default against defendant DWIGHT SMITH was presented in Appeal No. B052261 as Issue II on page 1 of the Opening Brief (hereinafter "OB"), to wit, "II. Was plaintiff entitled by law to have entry of default on defendant DWIGHT SMITH?" The facts regarding this issue were set forth under "(b) Course of Proceedings", sub-heading (2) "Request for Default on defendant SMITH" showing by references to the record that proofs of service were filed April 2, 1990; plaintiff (appellant) requested entry of default against SMITH on May 14, 1990; the request was rejected by the default clerk on May 25, 1990 based on purported deficiencies in form; to clarify, an amended proof of service was filed June 21, 1990.

The issue was argued on pages 16-19 of the OB under the heading "II. Plaintiff was entitled by law to have entry of default on defendant DWIGHT SMITH." [OB 16]. Plaintiff quoted the pertinent portion of CCP §585(b) [OB 16] and presented subsidiary questions, to wit, "Why was there an 11-day delay in returning the application for correction?" and "Why is the default clerk adjudicating a legal question about the manner of service and then rejecting the entry of default based on that adjudication of law?" [OB 17]. Plaintiff also argued [**APP.1**].

Defendant (respondent) filed a motion to quash service under CCP §418.10(a)(1), and argued the merits of the motion [Resp.Brief 9-12], challenging the manner of service, taking the position that the §418.10 motion ***superseded*** plaintiff's request for entry of default, never discussing CCP §473.5, the proper section under

which to challenge manner of service once entry of default has been requested and entered by the clerk *upon that request.* Regarding entry of default, defendant argued [APP.2]. Ironically, the section cited by defendant (CCP §585) *does not support their argument* but states "... the clerk... upon written application of the plaintiff, *shall enter the default of the defendant.*" [emph. added]. (See OB 16].

Plaintiff replied by arguing [APP.3]. Plaintiff cited (Goddard v. Pollock (1974) 37 Cal.App.3d 137, 142) which ruled that when a request for entry of default is made first, a subsequent motion to quash is *not controlling.* [Reply Br. p.3].

The first opportunity to bring up the federal question regarding the appellate court's failure to address this issue was after that court *refused* to do so when it summarily denied rehearing. Plaintiff argued violation of procedural due process resulting from that denial and challenged the constitutionality of Code of Civil Procedure §418.10(a)(1) as applied to him on pages 21-23 of the Petition for Review to the State Supreme Court. Review was also summarily denied, foreclosing all opportunity to be heard on the issue in State court which *destroyed* plaintiff's state tort remedy as to defendant DWIGHT SMITH.

(2) The issue of the Ruling on the Demurrer involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ (defendant SMITH is *not* part of this issue) was brought up on appeal (No. B053009) as the *first seven issues* on page 2 of his Supplemental Opening Brief (hereinafter "SB") as follows: [APP.4].

The facts regarding the demurrer were set forth under "(b) Course of Proceedings:", subheading "(3) Appearance by Demurrer." [SB 5-7]. Particularly on the ruling, plaintiff stated [APP.5].

Argument regarding the demurrer was presented as follows: [APP.6]. Defendants responded to the demurrer issue as follows: "V. Since he voluntarily dismissed his action, plaintiff cannot appeal the trial court's granting of the County

defendants' demurrer." [Resp.Brief p.21]. Excerpts of defendants' argument are: [APP.7]. Defendants take the position that plaintiff's voluntary dismissal under CCP §581(f)(2) ***waives his right to appeal the ruling on demurrer***. Plaintiff stated in his Reply Brief (hereinafter "RB") [APP.8].

The Court of Appeal did not address these arguments on appeal, stating "III. Branson's Remaining Contentions. As noted earlier, Branson has raised numerous other issues in his briefs claiming various errors by the trial court. We have reviewed those contentions and find that they do not require further discussion. (Spellis v. Lawn (1988) 200 Cal.App.3d 1075, 1079)." [Decision p.11].

The federal question regarding the blocking of a state remedy and violation of procedural due process as a result of the appellate court's oversight of appellate review of the ruling on demurrer was brought in his Petition for Rehearing: [APP.9]. Rehearing was summarily denied, ignoring argument regarding the demurrer on appeal under the guise of an ambiguous, undefined statement "those contentions do not require further discussion", citing Spellis. Plaintiff stated in his Petition for Review to the State Supreme Court: "Having analyzed Spellis relating to the appellate court's conclusion that 'those contentions... do not require further discussion', whatever the term 'those contentions' may refer to, it is clear that it ***cannot*** refer to the demurrer and the dismissal under CCP §581(f)(2) according to Spellis." [RVW p.17].

Defendants filed an "Answer to the Petition for Review" which perpetuates the fraud and cover-up already shown. In reply to that Answer, plaintiff stated [APP.10].

(3) The Dismissal issue was brought on appeal (No. B053009) as the eighth and ninth issues in the SB, to wit: "Regarding the Dismissal: VIII. Did the superior court have jurisdiction to dismiss this case only under CCP §581(f)(2)? IX. Did the superior court have jurisdiction to dismiss this case under CCP §§583.410 and

583.420?" [SB 2]. Facts regarding the defendants' motion to dismiss under §§583.410/583.420 are stated at SB pp 7-9 under "(4) Defendants' Motion to Dismiss" stating [APP.11].

Meanwhile, facts about plaintiff's §581(f)(2) dismissal were stated on pages 6-7 of the SB: [APP.12]. The dismissal issue was argued at SB pp 36-47 under two arguments: "VIII. The trial court had jurisdiction to dismiss this case under CCP §581(f)(2) only. [SB 36-40]; IX. The trial court had no jurisdiction to dismiss this case under CCP §§583.410 and 583.420." [SB 40-47].

The opening paragraph states [APP.13]. The closing paragraph of the dismissal argument stated [APP.14]. Defendants' response is discussed under the "Ruling on Demurrer" (the second issue ante); their position is that plaintiff should have pursued what they termed a "viable claim" after the demurrer was overruled on the third cause of action, and that by "voluntarily" dismissing the case under §581(f)(2), plaintiff waived his right to appeal the ruling on demurrer. (Portions from the Respondents' Brief are quoted under Issue 2). That position contradicts authority already cited and argued by plaintiff in the SB. Plaintiff replied to respondents stating [APP.15].

The federal question was basically argued under the "Demurrer" issue at SB pp 23-24 which goes to the foundation of the entire appeal: [APP.16]. The appellate court's refusal to address the ruling on demurrer and plaintiff's §581(f)(2) dismissal on appeal, and the State Supreme Court's denial of review thereof, perpetuate and exacerbate this federal violation that began with the trial court. Plaintiff filed request for judicial notice that the trial court recognize and accept his state tort action: "Plaintiff filed a 'Judicial Notice' specifically setting forth his intention of seeking, by this action, a ***state tort remedy*** under the state system of procedureal due process. [CT 676-677]. Judge Fields refused to take judicial notice...." [SB p.18]. Further, regarding the federal question, plaintiff stated in the REH: [APP.17].

Nevertheless, all doors were finally closed to any judicial remedy for redress in the State.

(4) The Consolidation issue was brought on appeal (No. B053009) as the thirteenth issue: "Regarding Consolidation of Appeals: XIII. Does the Court of Appeal have jurisdiction to consolidate appeals No. B052261 and B053009?" [SB p.3]. Plaintiff sought (among other things): "An order of this Court that... 12. There is no jurisdiction to consolidate Appeals No. B052261 and B053009 and they shall be decided independently." [SB 11-11]. This issue was fully argued at SB pp 61-65. Plaintiff opened argument stating [APP.18].

Defendants argued that this is "nonappealable" stating that plaintiff "seeks to relitigate this Court's order consolidating the two appeals" and that the issue "need not be addressed further." [Resp.Brief p.7]. Plaintiff replied "[T]he reason for bringing this issue into appeal is because it is ***jurisdictional*** by law on appellate courts and ***remains unaddressed*** [SB 61]. Appellant stands on his showing that these appeals cannot be consolidated as a matter of law in his Argument XIII." [RB 1].

The Court of Appeals failed to ***address the law regarding consolidation*** which appellant brought to its attention at REH pp 9-10, [APP.19]. The issue was then elaborately brought to the attention of the State Supreme Court as the first point in his Petition for Review: [APP.20].

Plaintiff then fully discussed the "Motion to Consolidate" at pages 6-8 of the RVW, stating: [APP.21]. Next in the Petition for Review, plaintiff fully discussed the "Consolidation Issue Brought On Appeal", stating: [APP.22]. Plaintiff then discussed "Deliberate refusal to act within the law regarding consolidation", stating three points regarding the appellate court's footnote on page 2 of its decision: [APP.23].

The federal question is then presented in plaintiff's "Constitutional challenge of appeal statutes" at RVW pp 10-11. The federal question was mentioned in the REH: "As a matter of proce-

dural due process, this Court must address the law regarding consolidation which governs its appellate jurisdiction." [REH 10]. A full presentation is made in his Petition for Review to the State Supreme Court stating in part: [APP.24].

Defendants answered the Petition for Review stating that plaintiff's claim that consolidation is unconstitutional is "preposterous" based first on the Court's authority to "transfer causes 'from one court of appeal or division to another....'" and second on the theory that "The two appeals filed by plaintiff arose out of the same trial court action and were based on a similar set of facts." [Resp.Brief p.7]. The second basis totally ignored what plaintiff had already briefed, to wit: "The fact that both appeals arise out of the same court action is *irrelevant*. The two appeals nevertheless are jurisdictionally separate and distinct and must be reviewed independently. 'Although... appeals arise out of the same action, they [may be], for all purposes, as separate and distinct as though they were taken from judgments rendered in different actions.' Silver v. Bank of America (1941) 43 Cal.App.2d 835, 838, 111 P.2d 666." [SB 64-65]. Regarding the first basis of defendants' Answer, plaintiff stated in his Reply to Answer [APP.25].

(5) The Disqualification issue was brought on appeal (B053009) as follows: "Regarding Disqualification: XI. Should Judge Fields be disqualified from this case? XII. Is CCP §170.4(b) unconstitutional as applied to appellant?" [SB 2]. The facts re Disqualification were set forth under "Course of Proceedings" under sub-heading (5) "Statements of Disqualification": [APP.26].

The issue was argued at SB pp 51-61 under two arguments: "XI. Judge Fields should be disqualified from this case [SB 51-56]; XII. CCP §170.4(b) is unconstitutional as applied to appellant [SB 57-61]." On the first argument, plaintiff stated: [APP.27]. Regarding the second argument, challenging constitutionality of S170.4(b), the federal question was brought on appeal. Plaintiff opened by stating: [APP.28].

Defendants, rather than address the issue, deemed it "nonappealable" stating that plaintiff's only remedy was by mandamus and since the Court denied plaintiff's petition (Case No. B051586) based on "absence of facts showing entitlement to extraordinary relief", the [appellate] Court "must ignore plaintiff's request to review his attempts to disqualify Judge Fields." [Resp.Brief p.7]. Plaintiff replied [APP.29].

The failure of the Court of Appeal to address the disqualification issue on appeal was brought to its attention at REH p 8-9. The federal question regarding violation of due process was raised therein: [APP.30]. Plaintiff again brought the federal question to the attention of the State Supreme Court in his Petition for Review, quoting portions of the REH: "***RESPONSE BY THE HONORABLE COURT OF APPEAL: 'THE COURT: Petition for rehearing denied"*** issued just three court days after it was filed...." [RVW 20].

Defendants again argued the issue was "nonappealable" stating "Plaintiff appealed from the trial court's orders striking his two statements of disqualification.... He raises this issue again in the present petition. However, such orders are not appealable. (Code of Civ.Proc. §170.3(d).) Plaintiff could have obtained review of these orders only in a mandamus proceeding filed within ten days after receiving notice of the orders." [Ans. to Pet. p.6]. Plaintiff replied at pages 7-11 of his Reply (which again brought in the federal question of due process to be heard): [APP.31].

ARGUMENT

Petitioner refers to himself as "plaintiff" to conform to the record; he is also the appellant.

(1) The California Court of Appeal deprived plaintiff of liberty and property without due process of law by refusing to address the Request for Entry of Default against defendant DWIGHT SMITH in Appeal No. B052261. (The constitutionality of Code of Civil Procedure §418.10(a)(1) is challenged.)

The liberty and property interest of plaintiff in this Petition is his statutory right to appeal, bringing with it the right to have the issues on appeal addressed by the appellate court.

One such issue is plaintiff's Request for Entry of Default against defendant DWIGHT SMITH in Appeal No. B052261 which was presented as Argument II of plaintiff's Opening Brief (hereinafter "OB") at pp 16-19. It was next argued in plaintiff's Reply Brief (hereinafter "RB") at pp 2-3. The issue was re-presented in plaintiff's petition for rehearing (hereinafter "REH") at pp 10-12, showing that the Court overlooked plaintiff's request for entry of default against SMITH and failed to discuss the matter. After rehearing was denied, the issue was brought to the State Supreme Court in plaintiff's petition for review (hereinafter "RVW") at pp 20-21. The issue was again brought in plaintiff's reply to the answer to his petition for review as "The first incident of obstruction of justice" at pp 5-6.

In his OB, plaintiff cited the law giving him the right to entry of default against DWIGHT SMITH [OB p.16] which is established by CCP §585(b) [set forth in Appendix]. Applying the law to the facts, plaintiff stated in his Reply Brief:

"As a matter of law, entry of default against SMITH must be entered nunc pro tunc as of May 14, 1990, the date he requested such entry. [CT 225-226], and SMITH can take nothing by his motion to quash. 'The notice of motion did not constitute an appearance preventing the entry of default. Respondent [appellant here] was entitled to such entry and the clerk should have entered it.... Section 585, subdivision 1, requires a default to be entered on application, if there is no demurrer or answer or notice of the character specified in section 585 on file. The clerk merely has to look at the record and see if there is a demurrer or answer or such notice on file. Seeing none, he must enter the default...' [emph.added]. W.A. Rose Co. v. Municipal Court (1959) 176 Cal.App.2d 67,71, 1 C.R. 49." [RB p.2].

"'The subsequent untimely filings by appellant [respondent SMITH here] and motions made by respondent did not affect the duty of the clerk to enter default when requested, nor did they restore the jurisdiction to the court which was lost when default should have been entered.' [emph.added].... 'The matter with which that Court was concerned was the record situation on August 1 when respondent was entitled to the entry of default which it requested. The municipal court thereafter lost jurisdiction to do anything but enter the default and judgment.' Id. p.72. 'The controlling aspect of the matter is the record situation on the date the petitioners were entitled to entry of default, that is, the date when the clerk received the default request; at that point [emph added] the court lost jurisdiction to receive or file any appearance by the defaulting defendant. Neither the subsequent purported filing of an answer nor petitioner's motion to strike the answer restored the jurisdiction which was lost when the default should have been entered. (citations).' Todd v. Everett (1966) 247 Cal.App.2d 209, 211-212, 55 C.R. 382." [RB p.3].

Accordingly, the trial court did not have jurisdiction to act upon defendant SMITH's motion to quash service. The court's jurisdiction was dictated by appellant's requesting entry of default against SMITH eleven (11) days earlier. "It follows, then, that the determinative question... is which of two events occurred first: the filing of defendants' motion to quash or the filing of plaintiff's request for entry of default." Goddard v. Pollock (1974) 37 Cal.App.3d 137, 142, 112 C.R. 215.

The Goddard case is directly on point. Nevertheless, the Court of Appeal totally ignored the issue. "The case of Mannesmann DeMag Ltd. v. Superior Court cited by the appellate court... is inapposite to appellant's case since Mannesmann does not involve a request for entry of default, which is determinative of the court's jurisdiction.... The trial court... did not have jurisdiction to act on defendant SMITH's motion to quash... or

to treat it as any other document in light of appellant's request for entry of default. Accordingly, by law, this court must remand the case to Superior Court and order default be entered against defendant SMITH nunc pro tunc May 14, 1990, and the case set for default trial pursuant to CCP §585 subd.(b)." [REH pp 11-12].

Plaintiff stated in his petition for review "The substance of Appeal No. B052261 regarding defendant DWIGHT SMITH rests upon petitioner's request for entry of default against SMITH which is the ***dispositive issue***. ... Appellate courts are obligated to first, address the ***dispositive issue*** (see Agricultural Labor Relations Bd. v. Laflin & Laflin (1979) 89 Cal.App.3d 651, 662-663 fn.11) and second, address the ***law applicable to that issue*** (see Zak v. State Farm etc. (1965) 232 Cal.App.2d 500, 506). ...The critical step the Court of Appeal refuses to take is identifying the ***dispositive issue***. ...Discussion I [of the decision is moot and irrelevant], since the issue of quashal of service was made moot by operation of law at the time request for entry of default against SMITH was made." [RVW pp 20-21].

Plaintiff challenged the constitutionality of CCP §418.10(a)(1) to the State Supreme Court stating "By refusal of the Court of Appeal to recognize the request for entry of default against SMITH under CCP §585(b) as the controlling law over SMITH's ***subsequent*** filing of a motion to quash under CCP §418.10, petitioner was denied statutory right to the entry of default which deprived him of his constitutional right to procedural due process in this appeal." [RVW 21-22].

Plaintiff quoted CCP §418.10(a)(1) and the pertinent portion of CCP §585(b) [see Appendix], followed by: "CCP §585(b) provides a mandatory duty on the part of the clerk that 'upon written application of the plaintiff, [the clerk] ***shall enter the default of the defendant***.' [emph.added]. An exception to that mandate...is provided that there shall be no notice of motion to quash service of summons on file....Petitioner requested entry of

default on May 14, 1990...while there was no notice of motion to quash service on file. The Court of Appeal ***ignores*** petitioner's request for entry of default and has now allowed a ***subsequent*** motion to quash service to supersede CCP §585(b). ...Therefore, petitioner challenges the constitutionality of CCP §418.10(a)(1) as applied to him in this case as being used to deprive petitioner of his constitutional right to due process of law established by statutory right under Code of Civil Procedure §585 subd.(b)." [RVW pp 22-23].

The petition for review was summarily denied April 29, 1992, and the constitutional question remains. Plaintiff has been deprived of liberty and property ***without due process of law*** by the Court of Appeal refusing to address the request for entry of default against defendant DWIGHT SMITH in Appeal No. B052261 in violation of the Fourteenth Amendment to the United States Constitution which has ***destroyed*** plaintiff's state tort remedy within the meaning of Daniels v. Williams (1986) 474 U.S. 327, 338-339, and Zinermon v. Burch (1990) 110 S.Ct. 975, 983.

(2) The Court of Appeal deprived plaintiff of liberty and property without due process of law by refusing to address the trial court's ruling on demurrer involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in Appeal No. B053009.

Another issue involving plaintiff's liberty and property interests on appeal is the appellate court's refusal to address the trial court's ruling on the demurrer involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in Appeal No. B053009. Plaintiff's opening brief in that appeal is denominated "Supplemental Opening Brief" (hereinafter "SB") by instruction of the appellate court when it unlawfully consolidated the appeals (discussed later). Defendant SMITH did not appear by demurrer and is not involved.

The ruling on demurrer was presented in Appeal No. B053009 as the first segment of Argument entitled "Regarding the Demurrer" and

covered the ***first seven points***, i.e., "I. This case is a state tort action and not a federal civil rights lawsuit [SB pp 13-15]; II. The ruling on demurrer is absolutely void and must be vacated [SB pp 15-17]; III. Appellant is being denied a state remedy [SB pp 18-20]; IV. Appellant has separate causes of action for violations of his federal rights and for violations of his state rights [SB pp 20-24]; V. Appellant complied with the claims procedure [SB pp 24-32]; VI. The 'policy or custom' allegation is not required in this state tort action [SB p.32]; and VII. Defendant BLOCK is liable as Jailer and is not covered by any immunities [SB pp 32-36]."

The trial court's ruling on demurrer is the major issue of Appeal No. B053009 and the appellate court ***totally ignored it.*** Plaintiff brought it to the attention of the Court of Appeal in his REH under heading #1 "The Court has overlooked the demurrer." [REH 2-4], stating "The single act of the Superior Court...which completely obstructs appellant's state tort remedy is Judge Fields' refusal to recognize this case as a state tort action, arbitrarily ruling without supporting evidence that it is a federal civil rights action. Based on that act alone, appellant has been blocked from pursuing a state remedy by this tort action and has been forced to take that issue on appeal in order to break that deadlock. Consequently, appellant's statutory right to appeal pursuant to CCP §904.1 subdivision (a) goes to his basic right to seek redress in state court by way of judicial remedy within the meaning of CCP §20. The oversight [i.e., omission] of appellate review of the ruling on demurrer which brings in the issues regarding a judicial remedy in the underlying case perpetuates and exacerbates the deprivation of procedural due process that has already occurred at the trial court level... and renders the appellate process meaningless." [REH p.2].

Plaintiff further stated "The trial court's ruling on the demurrer sets the framework of law on appeal from final judgment in LASC Case No.

C643013 [i.e., the state tort action]. While the appellate court acknowledges that a demurrer was filed..., the court overlooks the fact that the demurrer was sustained and fails to discuss the ruling on that demurrer which is the major presentation on appeal from final judgment....The first judicial act by the trial court was hearing and ruling upon the demurrer [SB p.6; CT 596-597]. It is therefore that judicial act that is controlling for purposes of appeal in Case C643013 forming the touchstone for appellate review." [REH p.3].

Plaintiff listed the seven arguments stating "Those arguments present the controlling questions of law on this appeal and appellant has been vested a liberty interest by statutory grant, pursuant to Code of Civil Procedure §904.1 subdivision (a), to have them reviewed and decided on appeal." [REH p.4]. Nevertheless, the Court of Appeal summarily denied rehearing, confirming its violation of procedural due process.

The Court of Appeal stated [Decision p.4] "On May 1, 1990, the County of Los Angeles, Sheriff Block, and James Perez jointly filed a demurrer to Branson's complaint...." however the Court failed to discuss the disposition of that demurrer. On petition for review to the State Supreme Court, plaintiff stated "The appellate court's decision overlooks the substance of this appeal (B053009).... The Court avoided substantive issues under the guise of Spellis v. Lawn (1988) 200 Cal.App.3d 1075, 1079, stating on page 11 of its decision: 'As noted earlier, Branson has raised numerous other issues in his briefs claiming various errors by the trial court. We have reviewed those contentions and find that they do not require further discussion.' (citing Spellis)." [RVW p.12]. Among those "numerous other issues" was the ***ruling on demurrer***. Plaintiff further stated "That statement consists of four ambiguities which are not defined, to wit: 'numerous other issues', 'various errors', 'those contentions', and 'find that they do not require further discussion.' Petitioner attempted to put some definition into those ambiguities by

specifically pointing out in the REH the substantive issues that were 'overlooked' by the Court and explaining why they are absolutely necessary for consideration to arrive at a decision on appellate review." [RVW pp 12-13]. Thus, the ruling on demurrer, consisting of seven sub-issues on appeal, was totally ignored by the appellate court.

Plaintiff stated "If the Court of Appeal is going to rely on Spellis...it must show how the case specifically applies. In order to 'find', it must: (1) ***state the facts*** upon which the finding relies, (2) ***show the evidence*** supporting those facts, and (3) ***apply the proper law*** to those facts....Since the Court refused to define its terms, petitioner analyzes Spellis relating to the conclusion that 'contentions do not require further discussion.'" [RVW p.13]. After a full legal analysis of Spellis [RVW pp 13-16], plaintiff stated "Accordingly, the sustaining of the demurrer was the 'ruling or decision' that was dispositive of petitioner's case...and the appellate court must (1) discuss ***the law*** upon which that ruling is based, and (2) show that such law ***is applicable to petitioner's case***, i.e., applicable to the particular ***facts of petitioner's case.***" [RVW p.16].

Review was summarily denied by the State's highest court. Accordingly, plaintiff has been deprived of liberty and property ***without due process of law*** by the Court of Appeal refusing to address the ruling on demurrer in violation of the Fourteenth Amendment to the U.S. Constitution which has ***destroyed*** plaintiff's state remedy within the meaning of Daniels v. Williams (1986) 474 U.S. 327, 338-339 and Zinermon v. Burch (1990) 110 S.Ct. 975, 983.

(3) The Court of Appeal deprived plaintiff of liberty and property without due process of law by refusing to address the dismissal under CCP §581(f)(2) involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in Appeal No. B053009.

Another violation of plaintiff's liberty and property interests on appeal, without due process

of law, is the appellate court's refusal to address the dismissal of Case No. C643013 under CCP §581(f)(2) following the ruling on demurrer. The Dismissal issue was presented on appeal as the second segment of argument in Appeal No. B053009, entitled "Regarding the Dismissal" and covered two sub-points: "VIII. The trial court had jurisdiction to dismiss this case under CCP §581(f)(2) only [SB pp 36-40]; and IX. The trial court had no jurisdiction to dismiss this case under CCP §§583.410 and 583.420." [SB pp 40-47].

Section 581(f)(2) is a dismissal "on the merits under the law" following sustaining of a defendant's demurrer with leave to amend and the plaintiff chooses not to amend, but moves to dismiss and appeal the ruling. On the other hand, §§583.410 and 583.420 is a discretionary dismissal ***not*** on the merits for a lack of prosecution. Distinction between the two dismissals is ***jurisdictional.*** When a trial court ***rules on a demurrer***, the §581(f)(2) dismissal is required by law following a motion therefor, ruling out "discretionary dismissal" for lack of prosecution.

The record shows the trial court ***withheld*** §581(f)(2) dismissal requested by plaintiff until the defendants could be heard on their motion to dismiss under §§583.410 and 583.420 filed ***after*** the ruling on demurrer had already taken place--which rendered moot the defendants' motion by operation of law. The trial court's final decision was to include ***both dismissals*** because the defendants "preferred" both dismissals for appeal as an "option" for the appellate court-- although according to law, such an "option" doesn't exist. Nevertheless, the appellate court cooperated in the scheme by "opting" to rule only on the defendants' ***discretionary dismissal.*** The State Supreme Court allowed this fraudulent scheme to stand by summarily denying review, thereby ***destroying*** by fraud and manipulation plaintiff's state remedy against defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in Appeal No. B053009. Herein lies the crux of the violation of

procedural due process by the State courts in plaintiff's state remedy in Case No. C643013.

Plaintiff fully briefed the §581(f)(2) dismissal on facts and law on appeal [SB pp 36-40] and stated "Only one dismissal is required, and the dismissal on law under §581(f)(2) would take precedence over discretionary dismissal....Defense counsel's rationale for asking the [trial] court to stay the operation of law under §581(f)(2)...was 'since it's quite likely...he will appeal such dismissal, when the court considers the dismissal, it dismiss it on all possible grounds so we have the strongest case possible for appeal.' [RT 8/13 17:25 - 18:1]." [SB 39].

Plaintiff requested judicial notice be taken of the facts, and stated in the opening brief of Appeal No. B053009: "On August 17, 1990, appellant filed another request for judicial notice pursuant to E.C. [Evidence Code] §§452 and 453 'for the purpose of preserving for appeal the issue of the final dismissal of this case on issues of law determined by the ruling on demurrer and the expiration of the time granted in which to amend the first amended complaint, making this case ripe for final judgment of dismissal as of August 2, 1990, under CCP §581(f)(2), and thus mooting by operation of law defendants' motion for discretionary dismissal as of August 2, 1990.' [CT 929:21-27]. Appellant requests this [appellate] Court also take judicial notice of the facts stated and supported by exhibits [CT 930-994] pursuant to E.C. §459." [SB 40] (See Appendix re Evidence Code statutes).

Plaintiff fully briefed discretionary dismissal in this case [SB 40-47], stating at SB pp.43-44: "By operation of law, as of June 11, 1990, the court had no jurisdiction to dismiss this case under CCP §§583.410, 583.420, 583.420(a)(1), or 583.420(a)(2)(A), now covered by Chapter 1.5 of Title VIII of the Code of Civil Procedure, nor does CRC [California Rules of Court] Rule 373 have any application. [CT 1014]...." **(Compare with the appellate court's decision, paragraph II under "Discussion")** [continuing]: "...'It is clear that

where there has been a judgment of dismissal after demurrer sustained without leave to amend or leave to amend is granted but plaintiff fails to amend within the time allowed, the action is finally terminated by the judgment because there is no longer any pending undetermined action to dismiss. It should also be clear that an action is not subject to [a §583] dismissal where issues of law leading to its final determination have been submitted.' Berri v. Superior Court (1955) 43 Cal.2d 856, 859."

Plaintiff briefed: "...Judge Fields refused to immediately dismiss by operation of law, turning instead to defense counsel and asking 'Do you want me to grant that now?' [RT 8/13 17:13-14]. Defense counsel responded... 'We are in a strange position' and that they would 'prefer the court wait...' [RT 8/13 17:23 - 18:8]. Judge Fields stated 'All right, we will wait....' [RT 8/13 18:13-14]. ...Defense counsel [argued] 'In an unusual twist' both parties seek dismissal on different grounds. 'Since the end result is the same, dismissal with prejudice, defendants request that this court separately evaluate the merits of each of these independent grounds for dismissal of this case.' [CT 901:7-10]...." **(NOTE: Dismissals pursuant to Chapter 1.5 (commencing with Section 583.110) of the Code of Civil Procedure are *without prejudice*. See CCP §581(b)(4) and §581(g)).** It is further noted that dismissals pursuant to Chapter 1.5 are ***not independent*** of dismissals under Chapter 1 of the Code. [continuing]: "...Counsel then acknowledges plaintiff's §581(f)(2) motion along with their §583 motion and concludes 'Defendants request that this court grant the dismissal with prejudice on all of the above cited grounds.' [CT 901:16-22]." [SB 45-46]. Had the trial court dismissed the case under §581(f)(2) immediately upon plaintiff's motion to do so, the appellate court could not have "affirmed" dismissal under §§583.410 and 583.420 as it did by the scheme provided.

Plaintiff summarized the law and facts regarding §581(f)(2) dismissal in his Reply Brief,

stating under heading #8 "Discretionary dismissal is moot. Under §581(f)(2) dismissal follows as a 'matter of course' after the demurrer was ruled upon and plaintiff requests such dismissal....Since the ruling was that the case was a federal civil rights action, the only thing left for plaintiff to do was to request dismissal under §581(f)(2) and seek prompt appeal of the judgment as a matter of course." [RB p.7]. Plaintiff "took the available remedy established by law to challenge the ruling on demurrer by prompt appeal", however that "remedy" was ***unavailable*** by practice. (See paragraph II under "Discussion" of the decision). That entire discussion is ***irrelevant*** to the facts of this appeal (B053009).

Plaintiff brought this omission to the Court's attention in his REH stating "...Just as the ruling on demurrer sets the controlling law to be reviewed on this appeal, the judgment of dismissal under CCP §581(f)(2) is the lawful means (i.e., the judicial remedy) by which such ruling on demurrer is made appealable pursuant to CCP §904.1 subd.(a). Appellant not only was granted a liberty interest by statutory right to dismissal under CCP §581(f)(2), but he is also granted a liberty interest by statute to have ***that dismissal*** [§581(f)(2)] reviewed on appeal under CCP §904.1 subd.(a) which provides the pathway to appellate review of the ruling on demurrer, as aforesaid. Therefore, the issues regarding dismissal in this appeal also go to the issue of ***remedy*** in this action and is part of the controlling law to be reviewed on appeal." [REH p.4].

Plaintiff stated "Appellant has presented jurisdictional arguments regarding the dismissal of Case No. C643013 wherein the discretionary dismissal...is analyzed ***in light of*** the dismissal under law....The discretionary dismissal can be discussed ***only in light of*** the §581(f)(2) dismissal which determines the ***jurisdiction*** of the court to dismiss under the particular facts and circumstances of this case. Since dismissal of this case is a question of jurisdiction, the facts and circum-

stances regarding the ruling on demurrer cannot be overlooked and ignored on this appeal. The Court of Appeal discussed ***only*** the discretionary dismissal without considering the 581(f)(2) dismissal...." [REH p.5]. The appellate court declined to rehear this vital issue.

On petition for review to the State Supreme Court, plaintiff stated that the Spellis case actually ***requires*** a discussion of the demurrer and the §581(f)(2) dismissal. [RVW 13]. Elaborating, plaintiff stated "Specifically, as stated in Zak v. State Farm etc. (1965) 232 Cal.App.2d 500, 506, 'where the relevancy of the pleadings was put in issue', the appellate court must discuss the 'judgment entered following the sustaining of [the] demurrer' which, in petitioner's case, was ***the CCP §581(f)(2) dismissal.*** As stated in Carman v. Alvord cited in Spellis at p.1079, 'A general demurrer searches the complaint for all defects going to the existence of a cause of action and ***places at issue the legal merits of the action*** on assumed facts. (citations).' [emph. added] 31 Cal.3d 318, 324...." [RVW p.16].

Review was summarily denied, depriving plaintiff of liberty and property ***without due process of law*** by the Court of Appeal refusing to address the dismissal under CCP §581(f)(2) involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in Appeal No. B053009 in violation of the Fourteenth Amendment to the U.S. Constitution, which ***destroyed*** plaintiff's state tort remedy against defendants COUNTY, BLOCK and PEREZ within the meaning of Daniels v. Williams (1986) 474 U.S. 327, 338-339, and Zinermon v. Burch (1990) 110 S.Ct. 975, 983.

(4) The Court of Appeal deprived plaintiff of liberty and property without due process of law by refusing to keep Appeal No. B052261 involving defendant DWIGHT SMITH separate and distinct from Appeal No. B053009 involving defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ. (The constitutionality of Code of

Civil Procedure §904.1 subdivisions (a) and (c) is challenged).

The liberty and property interests of plaintiff violated by the Court of Appeal in this instance is his statutory right to have separately determined his two appeals, one under CCP §904.1 subd.(a) and the other under subd.(c) thereof. The Court arbitrarily consolidated the two appeals as a single appeal, thereby violating plaintiff's right to procedural due process on both appeals.

The issue of Consolidation was presented in Appeal No. B053009: "XIII. Appeals No. B052261 and No. B053009 cannot be consolidated as a matter of law." [SB 61]. Plaintiff stated "On June 26, 1991, this [appellate] Court filed its Order consolidating appeals No. B052261 and B053009. Since this issue is a pure question of law, and is jurisdictional, appellant brings the issue as part of this appeal in order for the law on that matter to be addressed, so that these appeals can be pursued as the law intended them to be." [SB 61]. The subject was never addressed by the Court of Appeal.

Plaintiff fully briefed the law regarding appeals and consolidation in the opening brief of Appeal No. B053009 [SB 61-65]. In his Reply Brief, plaintiff reconfirmed his position regarding consolidation in the opening paragraph: "1. The question of consolidation is jurisdictional. ...[T]he reason for bringing this issue into appeal is because it is ***jurisdictional*** by law on appellate courts and remains unaddressed [SB 61]." [RB 1].

Despite law regarding consolidation, the appellate court ignored it altogether and proceeded to rule on the appeals under consolidation in violation of law. Plaintiff brought the omission to the Court's attention under heading #4 of the REH: "4. The Court has overlooked the law regarding consolidation" stating: "As a threshold issue, going to the jurisdiction of this appellate court to hear and decide the appeals brought before it, is the question of consolidation of Appeals No. B052261 and B053009. ...The issue was thoroughly briefed on pages 61-65 of the SB. The only mention of

consolidation in the Court's decision on appeal is by footnote appearing on page 2, noting that Appeals B052261 and B053009 were ordered consolidated." [REH 9].

The appellate court summarily denied rehearing. This was the first issue presented in plaintiff's petition for review before the State Supreme Court: "(1) The Court of Appeal acted in clear absence of its appellate jurisdiction when it consolidated these appeals. (Constitutionality of CCP §904.1 subdivisions (a) and (c) as applied to petitioner are hereby challenged.)" [RVW 3]. Plaintiff then thoroughly briefed the facts regarding the filing of Appeal B052261 [RVW 3-4], followed by a detailed factual accounting of the filing of Appeal B053009 [RVW 4-6].

Plaintiff then thoroughly discussed the defendants' Motion to Consolidate the appeals and plaintiff's opposing declaration [RVW 6-7], and stated: "Upon verification Division Two [of the Court of Appeal] would have known that (1) Appeal B052261 was properly filed and invoked appellate jurisdiction under CCP §904.1 subd.(c); and (2) Appeal B053009 did not qualify for appellate review under §904.1 subd.(c). Therefore, they are ***two separate appeals according to law!*** There was nothing further to debate and...the Court of Appeal was obligated by law to immediately deny the Motion to Consolidate, as the Court has no power to act contrary to the Legislature in consolidating that which the Legislature has purposely separated." [RVW 7] [NOTE: The Court nevertheless proceeded under ***arbitrary power***].

Plaintiff then summarized the issue as presented in Appeal No. B053009, making page references to the supplemental brief where the argument appeared [RVW 8-9], followed by a discussion of how the issue was treated by the Court of Appeal: "(e) Deliberate refusal to act within the law regarding consolidation" [RVW 9], concluding that discussion with "[T]he fact that 'On June 26, 1991, we ordered the two appeals consolidated into this proceeding' [see fn.1 of the decision] does not

address the issue on appeal, i.e., 'Does the Court of Appeal ***have jurisdiction to consolidate*** appeals No. B052261 and B053009?' [emph. added] [SB 3]...." [RVW 10].

Plaintiff then challenged the constitutionality of the appeal statutes as applied to him [RVW 10-11]: "As a result of the despotic actions by the Court of Appeal in arbitrarily consolidating these appeals, in direct contempt of the law which was fully presented to the Court ***before*** it ordered consolidation-- and ***never*** addressing the law on this issue, neither on appeal or upon petition for rehearing, the Court has violated petitioner's statutory right to the appellate process as it was designed and intended by the Legislature. Consequently, by its arbitrary ignoring and refusing to follow statutory authority establishing appellate jurisdiction in this case, the Court of Appeal has proceeded in clear absence of jurisdiction, thereby depriving petitioner of his constitutional right to procedural due process under the Fifth and Fourteenth Amendments to the U.S. Constitution."

"'When the State itself creates a statutory right..., the State also creates a liberty interest...' Haygood v. Younger (9th Cir.1985 en banc) 769 F.2d 1350, 1355. 'A person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government. (citation). Wolff v. McDonnell (1974) 418 U.S. 539, 558.' Meachum v. Fano (1976) 427 U.S. 215, 226, 96 S.Ct. 2532, 2539, 49 L.Ed.2d 451....Petitioner's statutory right to the appellate process in California meets the above criteria under federal constitutional standards. Inasmuch as that right is violated by the Court of Appeal herein, petitioner challenges the constitutionality of Code of Civil Procedure §904.1 subdivisions (a) and (c), as applied to him in this appeal." [RVW 10-11].

Review was summarily denied by the State Supreme Court on April 29, 1992, and the constitutional question remains unaddressed by the State

courts. Plaintiff has been deprived of liberty and property ***without due process of law*** by the Court of Appeal refusing to keep Appeal No. B052261 against defendant DWIGHT SMITH separate and distinct from Appeal No. B053009 against defendants COUNTY OF LOS ANGELES, SHERMAN BLOCK, and JAMES PEREZ in violation of the Fourteenth Amendment to the U.S. Constitution, which ***destroyed*** plaintiff's state tort remedy against said defendants within the meaning of Daniels v. Williams (1986) 474 U.S. 327, 338-339 and Zinermon v. Burch (1990) 110 S.Ct. 975, 983.

(5) The Court of Appeal deprived plaintiff of liberty and property without due process of law by refusing to address the issue of the disqualification of the trial judge. (Constitutionality of Code of Civil Procedure §170.4(b) is challenged).

Plaintiff was entitled to have the issue of Disqualification heard on Appeal No. B053009, however the Court of Appeal refused to address the issue. This issue was presented on appeal by two arguments: "XI. Judge Fields should be disqualified from this case [SB 51-56], and XII. CCP §170.4(b) is unconstitutional as applied to appellant." [SB 57-61].

Plaintiff fully briefed the facts of his case regarding the two separate Statements of Disqualification filed against Judge Fields. One instance for disqualification described by plaintiff in the opening brief (B053009) is: "...plaintiff feels that he is being held hostage to the arbitrary and capricious rulings and actions of Judge Fields, whom plaintiff has already indicated on the record as being biased and prejudiced against him and under the total dominance and control of defendant COUNTY OF LOS ANGELES.... [CT 799:20-24]." [SB 53].

Plaintiff then argued that CCP §170.4(b) is unconstitutional as applied to appellant, citing an abundance of authority in support of that argument [SB 57-61]. The Court of Appeal ignored the disqualification issue on appeal and plaintiff brought the omission to the Court's attention in

the REH: "The disqualification issue in this appeal ... ask: XI. Should Judge Fields be disqualified from this case? and XII. Is CCP §170.4(b) unconstitutional as applied to appellant? [SB p.2].... They are questions of law going to the constitutional issue of due process of law which had already been raised but not addressed in the Petition for Writ of Mandate in Case No. B051586 regarding the first Statement of Disqualification [SB p.52]. Because of the misapplication of the disqualification statutes unilaterally by Judge Fields on two separate occasions, allegedly denying appellant an opportunity to be heard at a meaningful time and in a meaningful manner in violation of due process of law, appellant challenged the constitutionality of Code of Civil Procedure §170.4(b) as applied to him in this case [SB p.57]. The due process violation described pertains to the obstruction of a judicial remedy in state court by Judge Fields' refusing to recognize this case as a state tort action [SB p.57] and his misapplying and abusing the disqualification process [SB pp 59-60] to avoid addressing his failure to administer the remedy to which appellant is entitled within the meaning of CCP §§20 and 187. An essential element of procedural due process is an impartial judge (7 Witkin Summ. 9th, Const. Law §504 p.695) who will grant an opportunity to a fair hearing and provide the judicial remedy required by law. The disqualification issue, including the challenge of constitutionality. goes to the issue of ***remedy*** in this state action and must be addressed on this appeal." [REH 8-9]. Rehearing was denied.

Before the State Supreme Court, plaintiff stated: "Here is another basic and substantive issue which the Court of Appeal deliberately shunned. That matter was brought to the Court's attention on pages 8-9 of the REH. The purpose of filing a Statement of Disqualification against Judge Fields...was to remove him from the case because of the way he was handling the SMITH motion to quash, the demurrer as to the other defendants, and the dismissal of the action --not from the

standpoint of 'error', but from the standpoint of ***violating law*** under which he is to act, jurisdictionally, substantively, and procedurally." [RVW 18].

Review was summarily denied. There has been provided ***no forum in the State*** to address disqualification or other matters going to the issue of ***a remedy in the State court system*** to redress alleged wrongdoing under tort law against these defendants. The question of the constitutionality of CCP §170.4(b) remains unaddressed by the State courts and plaintiff repeats it here, in substance:

"XII. CCP §170.4(b) is unconstitutional as applied to appellant. Appellant stated in his petition (Case No. B051586) 'Unless this appellate court offers immediate relief by setting aside and vacating the July 6th order [CT 739], and ordering that Judge Fields either be disqualified, or ruling that he is deemed to have already consented to such disqualification by having failed to consent or submit a written verified answer to the charges pursuant to Code of Civil Procedure §170.3(c)(4), petitioner will be irreparably harmed by the denial of a fair and impartial trial and pretrial proceedings, which will deny him an opportunity to be heard at a meaningful time and in a meaningful manner in violation of due process of law. Such a result [brings] into question the constitutionality of Code of Civil Procedure §170.4(b) as applied to petitioner.

"...Appellant now challenges... the constitutionality of CCP §170.4(b) as it was applied to him, as a denial of an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., procedural due process. Both the California and U.S. Constitutions guarantee due process of law (Art.I, Sec.7(a), California Const., and Fifth Amendment U.S. Const. applicable to the states through the Fourteenth Amendment). The U.S. Supreme Court has said 'The State may violate the Constitution by failing to provide an appropriate procedural response. It is not the deprivation of property or liberty that is unconstitutional; it is

the deprivation...*without due process of law*--without adequate procedures.' Daniels v. Williams (1986) 474 U.S. 327, 339....A state tort action is one such remedy which the law provides. [See Zinermon v. Burch (1990) 110 S.Ct. 975, 983].

"'The Due Process Clause "may sometimes bar trial by judges who have no actual bias..." To perform its high function in the best way, "justice must satisfy the appearance of justice." In re Murchison (1955) 349 U.S. 133, 136...' Aetna Life Ins. v. Lavoie (1986) 475 U.S. 813, 825. 'The Due Process Clause demarks only the outer boundaries of judicial disqualification. [The state may] impose more rigorous standards for judicial disqualification....'. Id. p.828. 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' In re Murchison (supra) 349 U.S. at 136.

"'Similarly, the California Constitution recognizes that bias or prejudice on the part of the trial judge may deprive a person of due process by depriving him of his right to a fair and impartial trial.' Garcia v. Superior Court (1984) 156 Cal. App.3d 670, 676, 203 C.R. 290. California has adopted a detailed statutory framework to govern disqualification of judges. 'The purpose of [CCP] section 170 is to insure that a party is given a fair and impartial trial.' Id. p.677. Appellant filed and served two Statements of Disqualification against Judge Jerry K. Fields pursuant to CCP §170.3(c)(1). This procedure calls only for 'setting forth the facts constituting the grounds for disqualification.' The grounds for disqualification under this statutory framework are set forth in §170.1, listing seven grounds.

"The ground for both of appellant's Statements is §170.1(a)(6)(C) which states: '(a) A judge shall be disqualified if any one or more of the following is true: ... (6) For any reason... (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be

impartial....' Appellant has stated that ground in both Statements and has given substantial narrative of facts and law to support his belief that he cannot receive a fair trial or any fair proceeding before Judge Fields....

"Judge Fields uses CCP §170.4(b) to undermine the 'statutory framework' described in Garcia. He used it to hinder 'a party, such as appellant [from obtaining] a fair and impartial trial' rather than 'insure that [such] is given.' Judge Fields, being biased, would naturally be prone to take advantage of an unconstitutional application of §170.4(b), leaving plaintiff victimized by his personal bias. Due process under §170.3(c)(5) is therefore made ***void*** and ***null*** by §170.4(b).

"The basic right of redress of grievances is set forth in Article I, Section 3 of the California Constitution. This redress does not mean the right to complain of grievances, but the right to have grievances ***addressed***, i.e., reparation of wrong, or correction. (Web. Dic.). There must be a forum of review available other than that of the aggriever. To say that the right of redress of grievance is available unless the aggriever determines to strike the grievance under CCP §170.4 would be a ridiculous interpretation, and a violation of Article I, Section 26 of the California Constitution, which says 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' Notwithstanding legal argument is the ethical argument. For Judge Fields to rule on his own alleged wrongdoing, creates an obvious conflict of interest, and is as ludicrous as him sitting to judge on a case wherein he is the defendant.

"The Legislature has recently set forth its intent to expand the power and force of §170.1(a)(6)(C), rather than limit it, 'The key change in the new statutes is found in subdivision (a)(6)(C) of section 170.1 which provides for disqualification ***whenever a judge's impartiality might reasonably be questioned.*** [emph.added] ...The previous corresponding statute... has been construed to

require bias in fact. (citation). The reason given for the change is the difficulty in showing that a judge is biased unless the judge so admits. In addition, public perceptions of justice are not furthered when a judge who is reasonably thought to be biased... hears the case.' United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97, 103, 216 C.R. 4. Furthermore, the court also stated that the standard for disqualification for subdivision (a)(6)(C) is ***objective***. 'Disqualification is ***mandated*** if a person might reasonably entertain doubts concerning the judge's impartiality. Id.p.104.

"CCP §170.4(b) does not fit into this reasoning; it defeats it altogether. The 'statutory framework' that was adopted to govern disqualification of judges, ostensibly to promote 'public perceptions of justice' is self-contradictory. The purposes stated for the 'new statutes' are ***not*** served, and if §170.4(b) is permitted to be used as a tool ***by the disqualified judge himself*** to serve his own purposes and continue conducting 'business as usual' by the mere 'stroke of a pen', that section raises some serious constitutional questions. The disqualification statutes should be designed to guard against the possibility of this type of disposition of a Statement of Disqualification, and to promote the objectives and purposes that are purportedly to be served. Most important, §170.4(b) cannot be repugnant to either the United States or California Constitutions!

"Judge Fields should not be permitted to rely on §170.4(b) unchecked without some objective manner in which the claim that 'no legal grounds are disclosed' is confirmed. For a biased judge to be able to make such an arbitrary statement, using statutory language to fit his purpose, without more is unconstitutional and a violation of due process, especially when he is allowed to twist and tear apart the document and call it something else, or arbitrarily state what the purpose of the statement was, i.e., 'merely additional argument' or 'merely a request/motion for reconsideration' or

'merely dissatisfied with court decisions.'

"CCP §170.4(b) is unconstitutional as it was applied to appellant in this case." [SB 57-61].

No part of this presentation re disqualification was addressed by any California court. The entire issue goes to the subject of ***remedy*** in the State courts. Rehearing by the appellate court was summarily denied and review by the State Supreme Court was likewise summarily denied. Plaintiff now brings the matter to the U.S. Supreme Court.

Plaintiff has been deprived of liberty and property ***without due process of law*** by the Court of Appeal refusing to address the issue of disqualification of the trial judge on appeal (No. B053009) in violation of the Fourteenth Amendment to the U.S. Constitution which ***destroyed*** plaintiff's state tort remedy against the named defendants within the meaning of Daniels v. Williams (1986) 474 U.S. 327, 338-339, and Zinermon v. Burch (1990) 110 S.Ct. 975, 983.

CONCLUSION

In the interest of judicial economy, plaintiff requests that the United States Supreme Court rule on the federal questions at this time by accepting certiorari in this case and promptly take whatever action is necessary to enforce the constitutional guarantees of appropriate state procedures for providing a state remedy to redress alleged wrongdoing under state statute and tort law.

Dated: July 27, 1992

Resubmitted: August 10, 1992

Ronald L. Branson

RONALD L. BRANSON
Plaintiff/Petitioner

* * *

APPENDIX

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* * *

DECISION OF THE CALIFORNIA COURT OF APPEAL

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

RONALD L. BRANSON, Plaintiff and Appellant, vs. COUNTY OF LOS ANGELES, et al., Defendants and Respondents.	B052261 (Super.Ct.No. C643013) COURT OF APPEAL SECOND DIST. F I L E D FEB 19 1992 JOSEPH A. LANE, Clerk Deputy Clerk

Appeal from an order of the Superior Court of Los Angeles County. Jerry K. Fields, Judge. Affirmed.

Ronald L. Branson, in pro per., for Plaintiff and Appellant.

Morris, Polich & Purdy, Robert S. Wolfe, Douglas J. Collodel, and Zahava A. Stroud, for Defendants and Respondents.

Alleging he had been illegally incarcerated by the Los Angeles Sheriff's Department, plaintiff Ronald Branson, appearing in propria persona, commenced an action seeking damages under certain state theories of recovery. The complaint named as defendants the County of Los Angeles, Sheriff Sherman Block, Sergeant Dwight Smith, and Deputy James Perez. The trial court dismissed the action against defendants on various grounds. 1/ Now, again representing himself, Branson appeals from the ~~order~~ of dismissal. We affirm.

CONTENTIONS

Branson makes numerous and lengthy arguments which he claims demonstrate that the trial court improperly dismissed his lawsuit. Of those contentions, only two are worthy of discussion. The first issue is whether the trial court improperly quashed service of process on Sergeant Smith. The second argument questions whether the trial court abused its discretion when it dismissed the action against the other defendants for delay in prosecution.

FACTS

The record reveals the following chronology of events. On April 7, 1987, Branson initiated this lawsuit.

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1. Procedurally, we note that Branson initially brought separate appeals: one from the order of dismissal of Sergeant Smith (B052261) and the other from the order of dismissal of the remaining defendants (B053009). On June 26, 1991, we ordered the two appeals consolidated into this proceeding.

----------2.----------

The complaint alleged that on May 11, 1986, officers of the Los Angeles Police Department, without a warrant or lawful process, arrested him. Three days later, Branson was transferred to the custody of the Los Angeles County Sheriff's Department and incarcerated in the Men's Central Jail. Branson was released from detention on May 16, 1986.

During the pendency of his state action, Branson commenced a civil rights lawsuit in federal court pursuant to 42 U.S.C. § 1983. That action was also based on his alleged false arrest and imprisonment. Furthermore, the federal action named as defendants, among others, the same parties as in the state action with the exception of Sergeant Smith.

On its own motion, the trial court in the in-

stant litigation dismissed the lawsuit on August 16, 1989, for lack of prosecution, pursuant to Code of Civil Procedure section 583.420, subdivision (a)(2)(B). 2/ Thereafter, in his papers

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2. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 583.420, subdivision (a)(2)(B) authorizes the trial court to dismiss an action for delay in prosecution two years after its commencement "because of the condition of the court calendar or for other reasons affecting the conduct of litigation or the administration of justice."

In conjunction with section 583.420, section 583.410 provides: "(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case. (b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council."

seeking relief from the dismissal, Branson claimed he was unaware of the two-year discretionary dismissal statute. He also divulged that he had been "actively engaged in federal litigation on a case arising out of the same incident as this tort action." Finally, Branson stated that he was waiting for the completion of that lawsuit before proceeding with the state litigation. On March 8, 1990, the trial court reinstated the action.

On April 2, 1990, Branson filed proofs of service alleging that each defendant had been served with copies of the summons and complaints on March 30, 1990, slightly more than one week before the three-year anniversary of this lawsuit. Pursuant to section 583.210, a plaintiff must serve the summons and complaint within three years after the action is commenced. 3/

On May 1, 1990, the County of Los Angeles,

Sheriff Block, and James Perez jointly filed a demurrer to Branson's complaint, along with a motion to dismiss the action due to lack of prosecution. Sergeant Smith, however, failed to make an appearance because, as the court would later determine, he had not been properly served with the lawsuit. As the undisputed facts revealed, on March 30, 1990, Branson attempted to effect substituted service on Sergeant Smith at

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3. Section 583.210, subdivision (a) provides: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed."

----------4.----------

the Pitchess Honor Rancho, the jail facility where Sergeant Smith was stationed. It was there that Branson's process server, Jimmy Ziegler, left the documents with Deputy Michael Santana, the officer guarding the entrance to the premises.

Accordingly, on May 25, 1990, Sergeant Smith filed a motion to quash the service of process. In his accompanying declaration, he stated: "On March 30, 1990, I was never served with plaintiff Ronald Branson's summons and complaint or first amended complaint in this action. Until defense counsel recently informed me that I have purportedly been served in this action, I had no knowledge that plaintiff had purportedly served me in this matter. To my knowledge, I have never been personally served with a complaint in this matter nor was I even aware of the existence of this lawsuit."

On June 20, 1990, Branson filed the declaration of Jimmy Ziegler, his process server. Ziegler stated that a Sergeant Pendergrass at the sheriff's office in the downtown courthouse informed him he could serve department personnel by leaving the papers with the watch commander at the facility where the officer worked. After learning Sergeant Smith was assigned to the Pitchess Honor

Rancho, the process server arrived at the detention facility. Ziegler further asserted that Deputy Santana denied him access to the premises because he could not produce valid identification. When the watch commander of the facility refused to meet with him, Ziegler left the papers with Deputy Santana.

----------5.----------

On June 29, 1990, the trial court quashed service of Sergeant Smith on the grounds that he had not been legally served within three years of commencing the action. Thereafter, on August 22, 1990, the trial court granted the remaining defendants' motion for dismissal pursuant to sections 583.410 and 583.420. In making its ruling, the court noted that Branson had delayed serving defendants until days before the running of the three-year statute of limitations. Applying the criteria of California Rule of Court, rule 373, the court found: "1) All defendants were readily available, at all times for service of process. 2) Plaintiff was not diligent in seeking service of process; in fact, he deliberately delayed in serving same. 3) No settlement discussions have been undertaken. 4) The case is not complex, essentially involving the alleged unlawful arrest of plaintiff. 5) There is [f]ederal litigation pending on the same facts which may be determinative of this case. 6) Neither party has otherwise delayed. 7) The interests of justice are served by dismissal of this action in that United States District Court case No. CV 87-03003-WDK(S)x is presently pending on the same facts."

DISCUSSION

I. Whether the Trial Court Erred in Quashing Service of Sergeant Smith

Branson first urges that the court improperly quashed service because Sergeant Smith waited beyond the statutory

----------6.----------

time period of section 418.10 to file his motion. That section, in relevant part, provides: "(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion...: (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her." Branson argues that because the last day for Sergeant Smith to have responded to the lawsuit was April 29, 1990, his motion of May 25, 1990, was untimely and, therefore, must be treated as a general appearance that waived his right to attack the service. We disagree.

Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal.App.3d 1118 held that a motion to quash was not the only method to attack an invalid service. The plaintiff ineffectively served the defendant on November 19, 1984, six days before the expiration date of the three-year limitation period of section 583.210. Over two months after the invalid service, the defendant filed a motion to dismiss for failure to be served within the three-year statutory period. That procedure of challenging service was approved by the court, which stated: "[W]e have found no authority stating that a motion to quash is the only or the exclusive method of raising the issue of the validity of the service of summons under the narrow circumstances of this case. The requirement of section 583.210, that 'summons and complaint shall be served upon a defendant within three years after the action is commenced...,' necessarily raises the issue of the

---7.---

validity of the service as '[o]nly effective service of summons and complaint satisfies section 581a [now § 583.210 et seq.].' [Citation.] When, as here, the attempted service is made very close to the running of the three-year period, a granted motion to quash would have afforded no opportunity to the plaintiff to have attempted to correct the defective service. Accordingly, not employing a

motion to quash did not prejudice real party. We conclude that under the factual situation herein involved petitioner properly attacked the validity of the service by a motion to dismiss under the three-year statute. To hold otherwise would be to exalt a procedural technicality over substance." (Id. at pp. 1124-1125, fn. omitted.)

We think the rationale of Mannesmann equally applies to the facts of this case. Branson waited until a week and a half before the three year date to serve Sergeant Smith. Whether Sergeant Smith then brought a motion to quash within 30 days or waited until later to seek a dismissal, Branson unquestionably would not have had the opportunity to re-serve him within the requisite three-year period. Branson therefore has suffered no prejudice by any purported delay in bringing the motion.

Citing Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal.3d 773, Branson next argues that service was effective because Deputy Michael Santana, the officer at the guard gate, had ostensible authority to accept service for Sergeant Smith based on the representation made by Sergeant Pendergrass at the courthouse.

----------8.----------

In Pasadena Medi-Center Associates, a corporation was held to have given ostensible authority to an individual named as the secretary-treasurer on the business' application for a stock permit. The facts of the present case, however, are strikingly dissimilar. Here, the record is devoid of any evidence that Smith held out Deputy Santana or the watch commander at the detention facility to be his agent for the purpose of personal service of a lawsuit naming him in his individual capacity. Obviously, Sergeant Pendergrass, as an unrelated third party, could not bind Sergeant Smith into an agent-principal relationship.

Finally, even assuming, arguendo, that Branson could establish the existence of implied

authority, it would be of no consequence. Clearly, such service would not be personal service as required by section 415.10. 4/ At best, it could only be a form of incomplete substituted service under section 415.20, for Branson failed to establish that he first made a good-faith attempt to personally serve Sergeant Smith or that he satisfied the mailing requirements of the statute. 5/

---

4. That section, in relevant part, provides: "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery."

5. Section 415.20, subdivision (b), in pertinent part, provides: "If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served..., a summons may be served by leaving a copy of the summons and of the complaint

(Footnote 5 to be continued)

II. Whether the Trial Court Improperly Granted the Remaining Defendants' Motion to Dismiss for Lack of Prosecution

Section 583.240 [sic] gives a trial court the discretion to dismiss a case where, among other things, service of process was not accomplished within two years of filing the complaint.

We recently noted in the similar case of Schumpert v. Tishman Co. (1988) 198 Cal.App.3d 598, 602-603, section 583.420 serves the purpose of discouraging stale claims while compelling reasonable diligence, thereby accelerating the administration of justice.

While there is a strong public policy to dispose of litigation on the merits rather than on procedural grounds (Denham v. Superior Court (1970) 2 Cal.3d 557, 566), that policy will not prevail unless a plaintiff meets his burden of

establishing excusable delay. (Salas v. Sears, Roebuck & Co. (1986) 42 Cal.3d 342, 347.)

In the case before us, Branson did not establish excusable delay. He did not serve the remaining defendants

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(Footnote 5 continued)
at such person's dwelling house, usual place of abode, usual place of business, or usual mailing address... in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address... at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

(i.e., all other defendants except Smith) for almost three years, and then only under threat of dismissal. As previously noted, the trial court, in its panoply of findings, determined that each defendant was at all times available for service of process, and Branson deliberately delayed seeking service. No facts have been presented to us which show that in making its ruling, the trial court abused its discretion.

In view of our holding, any discussion relative to dismissal based on failure to bring the matter to trial within two years (§ 583.420, subd. (a)(2)(B)) is moot.

III. Branson's Remaining Contentions

As noted earlier, Branson has raised numerous other issues in his briefs claiming various errors by the trial court. We have reviewed those contentions and find that they do not require fur-

ther discussion. (Spellis v. Lawn (1988) 200 Cal.App.3d 1075, 1079.)

DISPOSITION

The judgment (order of dismissal) is affirmed.

NOT TO BE PUBLISHED.

_____, J.
NOTT

We concur:

_____, Acting P.J.
FUKUTO

_____, J.*
HART

*Assigned by the Chairperson of the Judicial Council.

----------11.----------

ORDERS OF THE TRIAL COURT BEING APPEALED

(Appeal No. B052261)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 21
06/29/90
HONORABLE Jerry K. Fields JUDGE S. ROBLES/M. MANUEL DEPUTY CLERK
E. COFFEY/CT ATT Deputy Sheriff B. MALONE Reporter

C643013
Ronald L. Branson (X) Counsel for Plaintiff IN PRO PER
vs
County of Los Angeles, et al. Counsel for Defendant L. STROUD (X)

NATURE OF PROCEEDINGS
MOTION OF DEFENDANTS, COUNTY OF LOS ANGELES, SHERMAN BLOCK, AND JAMES PEREZ AND SPECIAL APPEARANCE ON BEHALF OF DEPUTY DWIGHT SMITH, TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT AND MOTION TO DISMISS FOR FAILURE TO PROSECUTE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 583.210:

MOTION OF PLAINTIFF, RONALD L. BRANSON, FOR SANCTIONS FOR FRIVOLOUS MOTION FILED IN BAD FAITH (CCP SECTION 128.5) AND FOR SANCTIONS FOR FAILURE TO COMPLY WITH COURT RULES (CRC RULE 227)

1. Granted as to Defendant Dwight Smith. Service of the summons and complaint is quashed. The case is dismissed against Smith per CCP 583.210.
2. Sanctions are denied.

Defendant to give notice.

An order of dismissal is prepared.

MINUTES ENTERED
06/29/90
DEPT. 21 COUNTY CLERK

* * *

(Appeal No. B053009)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 21

DATE 8-22-90
HONORABLE JERRY FIELDS JUDGE B. JEW DEPUTY CLERK
A. SALDANA, CT ATT Deputy Sheriff B. MALONE Reporter

C643013
RONALD L. BRANSON (X)
VS
COUNTY OF LOS ANGELES

Counsel for Plaintiff

Counsel for Defendant Z. STROUD

NATURE OF PROCEEDINGS

'PLAINTIFF'S MOTION [sic] PURSUANT TO CCP 170(6)(c) [sic] AND 170.4(b) [sic]

The second verified statement of disqualification of Judge Jerry K. Fields pursuant to CCP 170(6)(c) [sic] is stricken pursuant to CCP 170.4(b) in that on its face it discloses no legal grounds for disqualification.

Plaintiff's motion [sic] of disqualification merely shows dissatisfaction with the prior rulings of this court. It appears that every time plaintiff becomes dissatisfied with this court's rulings, he moves to disqualify for prejudice. This motion [sic] is in fact a motion to reconsider this court's ruling of 8-13-90. It appears to be based on this court's ruling concerning defendant's motion to quash the second service of summons and complaint on defendant Dwight Smith after the court on 6-29-0 [sic] had quashed service on Smith. Following the hearing on that motion, plaintiff re-served Smith, and Smith then moved to quash that service of summons and complaint which the court heard and granted on 8-13-90.

The court's ruling of 8-13-90 was incorrect. The previous order of this court of 6-29-90 quashing the first service of summons and complaint on Smith had been appealed at the time the court heard the motion to quash the second service on 8-13-90. Thus the basic ruling on which the court premised the 8-13-90 order, being on appeal, divested the court of jurisdiction. The court therefore vacates the order of 8-13-90 in its entirety and enters a new and different order staying the motion to quash the second service of Smith and denying sanctions on plaintiff. The court also denies plaintiff's request for sanctions against defendant Smith for the reason that defendant Smith filed his motion to quash service upon him prior to the date that plaintiff filed his appeal.

MOTION OF PLAINTIFF, RONALD L. BRANSON, FOR DISMISSAL BY PLAINTIFF UNDER CCP SECTION 581(F)(2)

MINUTES ENTERED
8-22-90
DEPT 21 COUNTY CLERK

----------[pg.1 of minute order]----------

[continuation of minute order of 8-22-90]:

1. Motion of defendant County of Los Angeles to dismiss per CCP 583.410 and 583.420 is granted for the following reasons:
a) Service of summons and complaint was not made within 2 years after the action was commenced. In fact, service was not made until 2 years and 11 months and 24 days after the case was filed (CCP 583.420(a)(1).
b) The action was commenced on 4-7-87, more than 3 years prior to the filing of this motion. (CCP 583.420(a)(2)(A).
c) Under the provisions of CRC 373(e):
1) All defendants were readily available, at all times for service of process.

2) Plaintiff was not diligent in seeking service of process; in fact, he deliberately delayed in serving same.

3) No settlement discussions have been undertaken.

4) The case is not complex, essentially involving the alleged unlawful arrest of plaintiff.

5) There is Federal litigation pending on the same facts which may be determinative of this case.

6) Neither party has otherwise delayed.

7) The interests of justice are served by dismissal of this action in that United States District Court case No. CV 87-03003-WDK(S)x is presently pending on the same facts.

2. Motion of plaintiff Branson for dismissal per CCP 581(f)(2) for plaintiff's failure to amend complaint after demurrer was sustained with leave to amend within the time allowed by the court is granted.

An order of dismissal is prepared.

Notice by Defendants.

MINUTES ENTERED
8-22-90
DEPT 21 COUNTY CLERK

----------[pg.2 of minute order]----------

* * *

(Appeal No. B053009)

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)

ATTORNEY(S) FOR

F I L E D
AUG 22 1990
FRANK S. ZOLIN
County Clerk
B. JEW
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

RONALD L. BRANSON,
Plaintiff(s)

VS

COUNTY OF LOS ANGELES ET AL.,
Defendant(s)

CASE NUMBER
C643013

ORDER OF DISMISSAL

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 581(f)(2), 583.410 and 583.420 of the Code of Civil Procedure as to

DEFENDANTS COUNTY OF LOS ANGELES, SHERMAN BLOCK, AND JAMES PEREZ.

PURSUANT TO PLAINTIFF'S MOTION PURSUANT TO 581(f)(2) CODE OF CIVIL PROCEDURES, THE ABOVE ENTITLED ACTION IS ALSO DISMISSED AS TO DEFENDANT DWIGHT SMITH [sic]

IT IS FURTHER ORDERED THAT SAID DEFENDANTS HAVE AND RECOVER COSTS AGAINST PLAINTIFF IN THE SUM OF $_____.

DATED: 8-22-90

/s/ JERRY K. FIELDS
Judge

117 760718(Rev.5-80) 12-80
RC057

ORDER OF DISMISSAL

ORDER DENYING REHEARING

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 03/10/92

Ronald L. Branson
10631 Lindley Ave.
Apt 223
Northridge, CA 91326

RE: Branson, Ronald L.
vs.
Los Angeles, County of
2 Civil B052261
Los Angeles NO. C643013

THE COURT:
Petition for rehearing denied.

* * *

ORDER DENYING REVIEW

Second Appellate District, Division Two, No. B052261/053009

SO25746

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

RONALD L. BRANSON, Appellant

v.

COUNTY OF LOS ANGELES, Respondent

SUPREME COURT
F I L E D
APR 29 1992

Robert Wandruff
Clerk

Deputy

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

LUCAS
Chief Justice

* * *

NOTICES OF APPEAL

(Appeal No. B052261)

RONALD L. BRANSON
8643 Kester Avenue
Panorama City CA 91402
No Phone

Plaintiff/Appellant
In Propria Persona

F I L E D
JUL 9 1990
FRANK S. ZOLIN
County Clerk
By C.C. Porter
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

RONALD L. BRANSON, Plaintiff/Appellant	No. C 643013
v.	NOTICE OF APPEAL
COUNTY OF LOS ANGELES, et al.,	(C.R.C. Rule 1)
Defendants/Respondents.	CASH FEE RECEIVED

PLEASE TAKE NOTICE that plaintiff and appellant, RONALD L. BRANSON, appoearing in propria persona, appeals to the Court of Appeals of the State of California, Second Appellate District, from the court action taken on June 29, 1990 by Superior Court Judge Jerry K. Fields in Department 21 of the above-entitled Court by his order made and entered June 29, 1990 granting defendants' motion to quash service of summons and complaint against defendant DWIGHT SMITH (served as "DOE I") and his dismissal from this action per CCP §583.210.

Dated: July 9, 1990

/s/RONALD L. BRANSON
RONALD L. BRANSON
Plaintiff/Appellant

* * *

(Appeal No. B053009)

RONALD L. BRANSON
8643 Kester Avenue
Panorama City CA 91402
No phone

Plaintiff/Appellant
In Propria Persona

F I L E D
AUG 23 1990
FRANK S. ZOLIN
County Clerk
By C. HON, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FEE RECEIVED
CASH

RONALD L. BRANSON,) No. C 643013
Plaintiff/Appellant,)
vs.) NOTICE OF APPEAL
COUNTY OF LOS ANGELES,) (Final Dismissal;
et al.,) Denial/Change of Venue;
Defendants/Respondents.) Striking Disqualification)
_____) (C.R.C. Rule 1)

PLEASE TAKE NOTICE that plaintiff and appellant RONALD L. BRANSON, appearing in propria persona, now appeals to the Court of Appeals of the State of California, Second Appellate District, from the court action taken by Superior Court JUDGE JERRY K. FIELDS, as follows:

(a) The final dismissal of this case made on August 22, 1990, based on (1) plaintiff's motion for dismissal by way of demurrer (CCP §581(f)(2)); (2) defendants' motion for discretionary dismissal for delay (CCP §§583.410 and 583.420); and (3) the court's discretionary dismissal for delay (CCP §583.420(a)(2)(A));

(b) The denial of plaintiff's motion for change of venue made on July 27, 1990;

----------[pg 1 of Notice of Appeal]----------

[Notice of Appeal continued (B053009)]:

(c) The striking of plaintiff's [first] Statement of Disqualification of JUDGE JERRY K. FIELDS made on July 6, 1990 (relief by Writ of Mandate denied July 23, 1990); and

(d) The striking of plaintiff's second Statement of Disqualification of JUDGE JERRY K. FIELDS made on August 22, 1990 (same date as final dismissal appealed herein).

Dated: August 23, 1990

/s/ RONALD L. BRANSON
RONALD L. BRANSON
Plaintiff/Appellant
In Propria Persona

* * *

PERTINENT TEXT OF CONSTITUTIONAL PROVISIONS & STATUTES

U.S. Constitution:

Fifth Amendment: No person shall... be deprived of life, liberty, or property, without due process of law; ...

Fourteenth Amendment: ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law; ...

California Constitution:

Article I, Section 7(a): A person may not be deprived of life, liberty, or property without due process of law....

Federal Statute:

Title 28 U.S.C. §1257(a): Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Code of Civil Procedure:

CCP §20: **Judicial Remedies--Defined.**

Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this State.

CCP §170.1(a)(6)(C): **When Judge Shall Be Disqualified.**

(a) A judge shall be disqualified if any one or more of the following is true: ...

(6) For any reason... (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

CCP §170.3(c)(1): **Disqualification Proceedings.**

(c)(1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

CCP §170.3(c)(4): A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the recusal as provided in subdivision (a).

CCP §170.3(c)(5): No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency of law, fact, or otherwise, of the statement of disqualification filed by a party. In every such case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge

selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice-chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible. No challenge pursuant to subdivision (c) of Section 170.3 or Section 170.6 may be made against the judge selected to decide the question of disqualification.

CCP §170.4(b): **What Disqualified Judge May Do.**

(b) Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.

CCP §187: **Implied Powers to Effectuate Conferred Powers.**

When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

CCP §418.10(a)(1): **Defendant May Serve and File Notice of Motion to Quash Service of Summons or to Stay or Dismiss Action--Time Limit--Grounds-**

(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

CCP §581(f)(2): (f) The court may dismiss the complaint as to that defendant when: ... (2) Except where Section 597 applies, after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend within the time allowed by the court and either party moves for dismissal.

CCP §583.410: **Court's Discretion in Dismissal Defined.**

(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

CCP §583.420(a)(2)(A): **Conditions for Dismissal.**

(a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred: ...

(2) The action is not brought to trial within the following times:

(A) Three years after the action is commenced against the defendant unless otherwise prescribed by rule under subparagraph (B).

CCP §585(b): **Default Judgment--Grounds; Procedures.**

Judgment may be had, if the defendant fails to answer the complaint, as follows: ...

(b) In other actions, if the defendant has been served, other than by publication, and no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10 or notice of the filing of a petition for writ of man-

date as provided in Section 418.10 has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there is no clerk, upon written application of the plaintiff, shall enter the default of the defendant. ... [pertinent portion].

CCP §904.1(a): **Appeal From Superior Court.**

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i),.... [pertinent portion].

CCP §904.1(c):

An appeal may be taken from a superior court in the following cases: ...

(c) From an order granting a motion to quash service of summons.... [pertinent portion].

California Evidence Code:

E.C. §452: **Permissive Judicial Notice.**

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislativfe, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the united States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common language within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

E.C. §453: **Permissive Notice Conditionally Mandatory Upon Request.**

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

E.C. §459: **Reviewing Courts.**

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the

reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

* * *

PERTINENT QUOTATIONS OF
SPECIFIC PORTIONS OF RECORD

(These quotations are taken from the Statement of the Case):

[APP.1]: "Appellant questions... the propriety of the default clerk refuting what the process server has affirmed was a 'personal service' and converting it into what the clerk has adjudicated as a 'substituted service', and then checking off defects based on the requirements for substituted service. Whether the 'personal service' checked on the proof of service by the process server is 'incorrect' is a legal question, and one that must be determined by the court after a proper and *timely* challenge of that 'personal service' is made by the defendant served. By the time an application for the entry of default was made, the time within which the manner of service may be directly challenged had already expired. ... Therefore, not only is that a question beyond the scope of clerical authority, but it is also beyond the time in which it may be questioned legally ***by the defendant.***" [OB 17-18].

[APP.2]: "D. **Plaintiff was not entitled to entry of default.** Irrespective of the approach taken, only one conclusion can be reached regarding plaintiff's purported service on Sergeant Smith-- this defendant was never served within the statutory three years limitations period. Plaintiff's claim that a default should have been entered against... Smith is frivolous and should be summarily rejected by this Court. See Code of Civil Procedure section 585, et seq." [Resp.Brief 13].

[APP.3]: "As a matter of law, entry of default against SMITH must be entered nunc pro tunc as of May 14, 1990, the date he requested such entry [CT 225-226], and SMITH can take nothing by his motion to quash" and then cited various cases showing the ministerial duty of the default clerk

to enter default when requested and showing that it is *jurisdictional.* [Reply Brief 2-3].

[APP.4]: "Regarding the Demurrer: I. Is this case a federal civil rights action? II. Is the ruling on demurrer void on its face and must it be vacated? III. Is appellant being denied his state remedy in superior court? IV. Does appellant have separate causes of action for violations of his rights under federal law and for violations of his rights under state law? V. Has appellant substantially complied with the tort claims procedure? VI. Is the 'policy or custom' allegation required in this state tort action? VII. Is defendant BLOCK liable as Jailer and not covered by any immunities?" [SB 2].

[APP.5]: "The demurrer was sustained with leave to amend as to the first, second, third and sixth causes of action. It was overruled as to the third cause of action, however the [trial] court ruled that the case was a federal civil rights action. [CT 596-597]." [SB 6]. Regarding the demurrer, plaintiff stated that he seeks the following relief: "An order of this Court that: 1. This case shall proceed as a state tort action for damages, and it is not a federal civil rights action. 2. The ruling on demurrer of June 11, 1990 be vacated. 3. Appellant is to receive a fair and impartial remedy in superior court on this action. 4. Appellant has substantially complied with the tort claims procedure. 5. The 'policy or custom' allegation is not required in this state tort action. 6. Defendant SHERMAN BLOCK is liable as Jailer and is not covered by any immunities." [SB 10-11].

[APP.6]: "I. This case is a state tort action and not a federal civil rights lawsuit [SB 13-15]; II. The ruling on demurrer is absolutely void and must be vacated [SB 15-17]; III. Appellant is being denied a state remedy [SB 18-20]; IV. Appellant has separate causes of action for violations of his federal rights and for violations of his state rights [SB 20-24]; V. Appellant complied with the

claims procedure [SB 24-32]; VI. The 'policy or custom' allegation is not required in this state tort action [SB 32]; VII. Defendant BLOCK is liable as Jailer and is not covered by any immunities [SB 32-36]."

[APP.7]: "...[T]he trial court's dismissal of Sergeant Smith and the County defendants was proper. Therefore, this Court need not address the propriety of the trial court's ruling on the County defendants' demurrer. Furthermore, plaintiff seeks review of a complaint which the trial court agreed set forth facts sufficient to state a valid cause of action. The trial court overruled the demurrer as it pertained to plaintiff's third cause of action for false imprisonment. (2 CT 597). Plaintiff was obligated to pursue his action to final judgment on that viable claim. Then, and only then, could he seek review of the trial court's ruling as to the remaining causes of action. See e.g. Evans v. Dabney (1951) 37 Cal.2d 758, 760, 235 P.2d 604.... Had plaintiff desired immediate review of the demurrer ruling, he should have filed a petition for an extraordinary writ to overturn the trial court's order. Supple v. City of Los Angeles (1988) 201 Cal.App.3d 1004, 1012, 247 Cal.Rptr. 554; Coulter v. Superior Court (1978) 21 Cal.3d 144, 148, 145 Cal.Rptr. 534, 577 P.2d 669. ... [P]laintiff should have filed a writ petition. In overruling the underlying demurrer as to plaintiff's false imprisonment claim, the trial court believed plaintiff had a potentially valid cause of action. He fatally erred by not litigating that claim and instead dismissing his entire action." [Resp.Brief 21-22].

[APP.8]: "Respondents' Argument V ignores appellant's argument that he was estopped from amending his complaint, and moving for dismissal under §581(f)(2) was the proper method for seeking prompt appeal of the ruling on demurrer. It also ignores the fact that appellant's main

argument on the demurrer presented in this appeal is that there ***are no viable causes of action*** to amend, as long as Judge Fields classifies the complaint as a federal civil rights action. Appellant took the only course of action he could under the circumstances, which he fully briefed on appeal. A writ petition is not applicable when the remedy of appeal is available." [RB p.12].

[APP.9]: "The single act of the Superior Court in Case No. C643013 which completely obstructs appellant's state tort remedy is Judge Fields' refusal to recognize this case as a state tort action, arbitrarily ruling without supporting evidence that it is a federal civil rights action. Based on that act alone, appellant has been blocked from pursuing a state remedy by this tort action and has been forced to take that issue on appeal in order to break that deadlock. Consequently, appellant's statutory right to appeal pursuant to CCP §904.1 subdivision (a) goes to his basic right to seek redress in state court by way of judicial remedy within the meaning of CCP §20. The oversight of appellate review of the ruling on demurrer which brings in the issues regarding a judicial remedy in the underlying case perpetuates and exacerbates the deprivation of procedural due process that has already occurred at the trial court level below and renders the appellate process meaningless." [REH p.2]. Plaintiff further stated "Those arguments [regarding the demurrer] present the controlling questions of law on this appeal and appellant has been vested a liberty interest by statutory grant, pursuant to Code of Civil Procedure §904.1 subdivision (a), to have them reviewed and decided on appeal." [REH p.4].

[APP.10]: "As the record reflects, Justice Nott refused to address the controlling law (ruling on demurrer and subsequent §581(f)(2) dismissal on the final appeal;...) and dispositive issues relating thereto. Instead he selected for discussion in the appellate process issues made moot, irrelevant and

non-dispositive by operation of law in both appeals, while deliberately, intentionally, maliciously and fraudulently ignoring the issues material, relevant, and dispositive of these appeals-- even refusing to ***acknowledge the existence*** of those issues." [Reply to Ans. p.11]. Further, plaintiff stated "In order to cover up Judge Fields' ruling on demurrer, Justice Nott joined in a conspiracy with the COUNTY and Judge Fields to commit fraud and deprive petitioner (plaintiff) of any and all available remedy (trial and appellate) within the judicial system in California. ..." [Reply to Ans. p.13].

[APP.11]: "Defendants COUNTY, BLOCK and PEREZ filed concurrently with their demurrer a Motion to Dismiss for Failure to Prosecute on May 1, 1990 [missing from CT]; appellant filed his opposition [CT 379], requested sanctions, and stated that he did not waive his right of default against defendant SMITH who did not appear on the demurrer or the dismissal motion and that a Request for Entry of Default against SMITH was being filed concurrently therewith." [SB 7].

Plaintiff further stated "The court refused to hear defendants' Motion to Dismiss on June 4, 1990, stating that it was set for another date. Defense counsel stated she was taking it off calendar for that date, pending the outcome of the demurrer. ...On June 5, 1990, defendants filed a Notice of Taking Motion to Dismiss Off Calendar [CT 581] [NOTE: "Notice" filed the ***day after*** the motion was to have been heard in court]. ... On June 21, 1990 defendants served... a Notice of New Date for their Motion to Dismiss [missing from CT].... On July 2, 1990 defendants filed a ***second*** Motion to Dismiss, essentially identical to their first motion. [missing from CT]. Appellant filed his opposition to the second Motion to Dismiss on August 7, 1990 [CT 817], and filed concurrently therewith a request for Judicial Notice regarding the judge's refusal to take judicial notice of the subject matter of this action, regarding appellant's

filing of a Motion to Dismiss on the [ruling on] demurrer under §581(f)(2), and regarding his oral request for dismissal under §581(f)(2) on August 6th and the judge's refusal to do so. [CT 798]. On August 13, 1990, appellant again orally requested dismissal on the [ruling on] demurrer under §581(f)(2) and was denied upon defense counsel stating their 'preference' that the ***dismissal wait*** until August 22nd, when their dismissal was on calendar. The [trial] court took appellant's Motion to Dismiss ***off calendar*** for August 20th and re-set it for the 22nd, over appellant's objection." [SB 7-9]. [NOTE: ***It is exactly this move by the trial court that ultimately allowed the appellate court to ignore altogether plaintiff's §581(f)(2) dismissal and "affirm" defendants' §§583.410/583.420 dismissal. Had the trial court promptly dismissed under §581(f)(2) as it should have done, the defendants' dismissal would not have been on appeal to interfere with plaintiff's rights to have the ruling on demurrer addressed on appeal.***]

[APP.12]: "Appellant filed... a Motion to Dismiss under CCP §581(f)(2) on the ruling on demurrer. [CT 789]. On August 6, 1990, while appearing in court on another matter, appellant made an oral request for dismissal under CCP §581(f)(2) as a matter of law. The [trial] judge refused to dismiss without the presence of defense counsel who did not appear on that date. On August 7, 1990, appellant filed Judicial Notice regarding the filing of his motion under §581(f)(2) and the denial of his oral request in court. At the next court appearance on August 13, 1990, appellant again orally requested dismissal under §581(f)(2) in the presence of defense counsel. The court asked defense counsel what they wanted to do, and she responded that she 'preferred' the ***dismissal wait*** until August 22nd, when their Motion to Dismiss was on calendar and both dismissals could be heard. Appellant's oral request was again denied and his motion that was set for August 20th was arbitrarily re-set for August 22nd over appellant's

objection." [SB 6-7]. [NOTE: Under the law, the §581(f)(2) dismissal *was controlling* in this case and should have been granted upon plaintiff's request as a matter of course following the ruling on demurrer. However, by this judicial manipulation, plaintiff's §581(f)(2) dismissal was ultimately ignored on appeal.]

[APP.13]: "This argument arises out of the sustaining of defendants' demurrer, and... appellant attempted to have the ruling on demurrer vacated as void on its face for failure to recognize this case as a state tort action, and that appellant had no other choice but to move to vacate the ruling. This was true... because the ruling created an estoppel against appellant amending the FAC (first amended complaint) without waiving his right to pursue his state remedy. 'The courts have declared... when a party does not leave his pleading where the order sustaining the demurrer has left it, he waives any error on the part of the trial court in sustaining the demurrer. (citations).' Sheehy v. Roman Catholic Archbishop (1942) 49 Cal.App.2d 537, 540... [CT 792:23 - 793:8]. Appellant had specifically stated that he ***does not waive*** his right to procedural due process on his state causes of action in state court. [CT 670:9-10]." [SB p.36].

Plaintiff also argued "Judge Fields, on his own, extended leave to amend to August 2, 1990 [CT 782; RT 7/27 11:28 - 12:23], despite appellant's protest and objection. [RT 7/27 12:25-28; 13:3-5, 12-13]. As stated in his motion to dismiss, appellant was not going to be amending the FAC under the current ruling that this case is a federal civil rights action [CT 791:16-18]; that he continues to stand on the subject matter of the FAC as presented. [CT 792:11-12; 793:14-17]. Accordingly, by statute ***the case was ripe for final dismissal as of August 2, 1990 under CCP §581(f)(2)*** [emph. added] as to the demurring defendants, COUNTY OF LOS ANGELES, SHERMAN BLOCK and JAMES PEREZ." [SB 37].

[APP.14]: "The dismissal under CCP §581(f)(2) [CT 1014] finally terminated the action. Dismissal under any other section was not only without jurisdiction, but was irrelevant. Appellant brought this jurisdictional matter to the [trial] court's attention on August 22, 1990 citing three cases [RT 8/22 20:28 - 21:10], however the court ignored all authority and jurisdictional limitations, and forged ahead... to arbitrarily dismiss under CCP §§583.410 and 583.420 ***without jurisdiction*** [RT 8/22 22:16-18] at the behest of the COUNTY so they could, using their own words, 'have the strongest case possible for appeal' [RT 8/13 17:25-18:1]." [SB 47]. [NOTE: The appellate court took advantage of this jurisdictional defect and "affirmed" dismissal under §§583.410 and 583.420 while ***ignoring*** plaintiff's dismissal under §581(f)(2)-- a decision just as ***void*** as the trial court's decision.]

[APP.15]: "8. Discretionary dismissal is moot. Under §581(f)(2) dismissal follows as a 'matter of course' after the demurrer was ruled upon and plaintiff requests such dismissal. Appellant was effectively estopped from amending as explained in the SB p.36. Since the ruling was that the case was a federal civil rights action, the only thing left for plaintiff to do was to request dismissal under §581(f)(2) and ***seek prompt appeal of the judgment*** as a matter of course." [emph. added] [RB p.7]. Plaintiff cited further authority as follows: "'Either party may move for dismissal; hence the plaintiff may have such a judgment [i.e., dismissal under §581(f)(2)] promptly entered and take a prompt appeal. ...' Berri v. Superior Court (1955) 43 Cal.2d 856; California Ammonia Co. v. Macco Corp. (1969) 270 Cal.App.2d 429, 433. Judge Fields did not have discretion [jurisdiction] to withhold the §581 judgment. 'Code of Civil Procedure §581(3) [now §581(f)(2)] now allows the plaintiff as well as the defendant to move for dismissal after he fails to amend....' California Ammonia (supra) p.433. 'Plaintiff... had two alternative remedies which it could have pursued,

and thus did not need to wait for the entry of dismissal under §583: one, to proceed by way of dismissal pursuant to §581(3) [now §581(f)(2)], or two, it could have proceeded via a writ of mandamus. Either procedure would have afforded plaintiff timely appeal wherein it could test the sufficiency of its complaint....' Id. p.433. Plaintiff herein sought the statutory motion procedure." [RB 7-8]. [**NOTE**: Writ of mandamus would not have been appropriate for plaintiff here because he would have had an adequate remedy by appeal following the §581(f)(2) dismissal. However, the appellate court ***foreclosed this remedy*** which was to have "afforded plaintiff timely appeal wherein [he] could test the sufficiency of [his] complaint", i.e., ***appeal the ruling on demurrer***].

[**APP.16**]: "He (Justice Stevens in Daniels v. Williams (1986) 474 U.S. at 338) further stated that on the other hand, the Federal Constitution requires states to provide appropriate and adequate procedural safeguards whenever state or local officials deprive a person of his liberty or property. Furthermore those procedures must be fair and provide an opportunity to either prevent or redress any such deprivation. (Daniels pp 338-339). Such is the case at bar; appellant is seeking an opportunity to redress the deprivation of his rights created and guaranteed under state law by the state procedural process. According to Daniels, Judge Fields' refusal to adjudicate this case on the merits as a state tort action rises to a violation of the Federal Constitution for failure 'to provide appropriate and adequate procedural safeguards' as aforesaid." [SB 23-24].

[**APP.17**]: "Just as the ruling on demurrer sets the controlling law to be reviewed on this appeal, the judgment of dismissal under CCP §581(f)(2) is the lawful means (i.e., the judicial remedy) by which such ruling on demurrer is made appealable pursuant to CCP §904.1 subd.(a). Appellant not only was granted a liberty interest by statutory

right to dismissal under CCP §581(f)(2), but he is also granted a liberty interest by statute to have ***that dismissal*** reviewed on appeal under CCP §904.1 subd.(a) which provides the pathway to appellate review of the ruling on demurrer, as aforesaid. Therefore, the issues regarding dismissal in this appeal also go to the issue of ***remedy*** in this action and is part of the controlling law to be reviewed on appeal." [REH p.4]. Also at the conclusion thereof, plaintiff stated "The substance of the appeal from final judgment in this case is unaddressed by this [appellate] Court, which works to perpetuate a lack of a judicial remedy in this state action and the violation of procedural due process in state court.... Unless the Court of Appeal exercises all the means necessary to carry its appellate jurisdiction into effect... appellant will be denied his statutory right to the appellate process in this state and deprived of his liberty interest in procedural due process in the courts of this state." [REH 15-16].

[APP.18]: "On June 26, 1991, this Court filed its Order consolidating appeals No. B052261 and B053009. Since this issue is a pure question of law, and is jurisdictional, appellant brings the issue as part of this appeal in order for the law on that matter to be addressed, so that these appeals can be pursued as the law intended them to be. Appellant filed a motion to deny consolidation on June 24, 1991, however, the Order was filed before the motion could be opposed by defendants or heard by this Court, therefore, the subject now comes up for argument and decision." [SB 61].

[APP.19]: "As a threshold issue, going to the jurisdiction of this appellate court to hear and decide the appeals brought before it, is the question of consolidation.... Before considering the issues going to the merits of the appeals themselves, this Court must first determine its own

jurisdiction to act under appellate statutes invoked by appellant.... The only mention of consolidation in the Court's decision... is by footnote appearing on page 2 merely noting that [the appeals] were ordered consolidated." [REH 9].

[APP.20]: "(1) The Court of Appeal acted in clear absence of its appellate jurisdiction when it consolidated these appeals. (Constitutionality of CCP §904.1 subdivisions (a) and (c) as applied to petitioner are hereby challenged)." [RVW 3]. The step-by-step process of filing the two appeals was set forth in detail. Regarding Appeal No. B052261 plaintiff stated "On May 15, 1991, petitioner filed his Opening Brief... which stated 'The order which is the subject of this appeal is Judge Fields' order of June 29, 1990, granting defendant's first motion to quash service on defendant DWIGHT SMITH and dismissing SMITH from the action. This appeal is taken pursuant to Code of Civil Procedure section 904.1 subdivision (c).' [OB p.7]. The specific order being appealed is described by date, type of order, and specific statute authorizing said appeal in the OB. Said statute authorizes an appeal from 'an order granting a motion to quash service of summons' and ***does not*** authorize an appeal from an order of dismissal. The appellate jurisdiction of the Court of Appeal in No. B052261 was thereby fixed by law and the appellate court had no power to act outside of this law." [RVW 4]. Regarding Appeal No. B053009 plaintiff stated "The filing of the Notice of Appeal on August 23, 1990 [CT 1016-1017, B053009] from the final action of the trial court on August 22, 1990 [CT 1013-1014, B053009] invoked appellate jurisdiction under CCP §904.1 subd.(a), which states in pertinent part: 'An appeal may be taken from a superior court in the following cases: (a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivision (h) and (i)...'. [See CT 1016-1017, B053009]." [RVW 6].

[APP.21]: "A cursory review of the OB [B052261] shows by the facts presented that defense counsel's motion to consolidate was ***facially defective*** by law. Consolidation of the two appeals taken under two distinct authorities is impossible as a pure matter of law as each appeal is determined by the statute invoked in the subject appeals. The statutory authority for filing appeals determines the ***appellate jurisdiction*** of the court and it was therefore incumbent upon the appellate court... in Appeal No. B052261 to first, check what statutory authority invoked the Court's jurisdiction, and second, check to see if the Notice of Appeal meets the criteria of the statute cited. Page 7 of the OB states that the 'appeal is taken pursuant to Code of Civil Procedure section 904.1 subdivision (c)' and the Notice of Appeal states that the appeal is taken from the 'order made and entered June 29, 1990 granting defendants' motion to quash service of summons...' [CT 344, B052261]." [RVW 7]. Further, plaintiff stated "Petitioner filed a Motion... To Deny Respondents' Motion to Consolidate Appeals as a Matter of Law, ... on June 24, 1991. Petitioner then presented his points and authorities on pages 8-13 showing that by law, it was impossible to consolidate the two appeals. Egregiously, the Court of Appeal ***ignored*** petitioner's motion filed June 24, 1991, and instead filed an Order two days later, on June 26, 1991, ***granting respondents' Motion to Consolidate Appeals*** without any legal discussion whatsoever--no law was cited, even though the matter is ***jurisdictional*** upon the Court of Appeal, and governs its power to act." [RVW 8].

[APP.22]: "The SB is actually appellant's opening brief of the final appeal (B053009).... Appellant stated that he 'proceeds under objection filed July 2, 1991, to the consolidation of these appeals for want of jurisdiction.' [SB p.1]. Because the law regarding consolidation was not addressed by the Court, petitioner was forced to bring the matter as

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an issue on appeal, jurisdictionally challenging the actions of the appellate court...." [RVW 8].

[APP.23]: "First, the issue was not 'procedurally' but was based on petitioner's ***substantive right to appeal*** established by statute which was being ignored. ... Second, the Court misstates the first appeal (B052261), a pure matter of ***record***. It is ***not*** 'from the order of dismissal of Sergeant Smith'.... Third, the fact that 'On June 26, 1991, we ordered the two appeals consolidated into this proceeding' does not address the issue on appeal, i.e., 'Does the Court of Appeal ***have jurisdiction to consolidate*** appeals...?'" [RVW 9-10].

[APP.24]: "...[T]he Court has violated petitioner's statutory right to the appellate process as it was designed and intended by the Legislature. Consequently, by its arbitrary ignoring and refusing to follow statutory authority establishing appellate jurisdiction in this case, the Court of Appeal has proceeded in clear absence of jurisdiction, thereby depriving petitioner of his constitutional right to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution." [RVW 10-11]. Plaintiff then cited several federal cases establishing a federally protected liberty interest when the State creates a statutory right and closed by stating "Petitioner's statutory right to the appellate process in California meets the above criteria under federal constitutional standards. Inasmuch as that right is violated by the Court of Appeal herein, petitioner challenges the constitutionality of Code of Civil Procedure section 904.1 subdivisions (a) and (c), as applied to him in this appeal." [RVW 11].

[APP.25]: "In order to cover up the jurisdictional question the COUNTY [i.e., defendants] laboriously argues the 'right of transfer of causes' (Answer p.7), as if 'transference' and 'consolidation' were synonymous. Transferring of causes is merely

administrative detail-- not a judicial act involving appellate jurisdiction. It was handled from Clerk to Clerk at the request of the Presiding Justices.... On the other hand, the right of appeal is wholly statutory and ***consolidation*** cannot interfere with that right as set forth by statute. The 'criteria for consolidation' is ***not satisfied*** if the appeals are authorized under ***two separate statutory provisions***." [Reply to Ans. p.3]. Plaintiff further stated in his Reply: "In disregard of plain statutory language, the COUNTY advises this [State Supreme] Court that consolidation is based upon what they call 'mere common sense and judicial economy' that a litigant should not be able to 'pursue various appeals of different issues from the same case at the same time.' (Answer p.2). First of all, the appeals did ***not*** arise 'at the same time.' Secondly, the COUNTY not only disregards statutory authority, but also case authority cited by petitioner in Appeal B053009 at SB pp 64-65 [quoting the portion from Silver v. Bank of America cited (supra)]. It is obvious therefore that the COUNTY's dispute is with the Legislature, in that [the COUNTY] does not believe the Legislature used 'common sense' when they enacted CCP §904.1(c) as authority for a ***separate appeal***. The COUNTY believes there should be no distinction between subdivisions (a) and (c) of Section 904.1 regarding appellate jurisdiction, but advises this [State Supreme] Court that those separate provisions should be consolidated for 'judicial economy'.... [T]hat matter is currently established by law, and until the Legislature changes it to suit the COUNTY, the law must govern appeals wherein a litigant may indeed 'pursue various appeals of different issues from the same case at the same time', provided it meets statutory requirements." [Reply to Ans. 3-4]. [NOTE: It was undoubtedly the intent of the Legislature that what happened in this appeal ***should not happen!***].

[APP.26]: "Appellant filed two Statements of Disqualification against Judge Jerry Fields, the first one on July 5, 1990 [CT 680], and the second one on August 20, 1990 [CT 996]. Both were arbitrarily stricken by Judge Fields under CCP §170.4(b), the first one on July 6, 1990 [CT 739] and the second one on August 22, 1990 [CT 1013]. Upon the striking of the first Statement, appellant filed a Petition for Writ of Mandamus with this [appellate] Court on July 16, 1990, Case No. B051586. The petition was denied March 23, 1990. This issue is now presented on appeal." [SB 9-10]. Plaintiff requested the following relief: "An order of this Court that: ...11. Judge Fields is disqualified from this case.... 13. The case be remanded to superior court under a newly assigned judge for appropriate proceedings." [SB 11].

[APP.27]: "[Judge Jerry Fields stated that both of appellant's Statements of Disqualification] were 'stricken pursuant to CCP §170.4(b)' for failure to disclose any legal grounds for disqualification. [CT 739; CT 1013]. Both Statements of Disqualification disclosed ***on their face*** the legal ground for disqualification pursuant to CCP §170.1(a)(6)(C) [quoting the statute]. Appellant sought relief on his first Statement... by filing a petition for Writ of Mandate on July 16, 1990, Case No. B051586, wherein plaintiff challenged the constitutionality of CCP §170.4(b). The petition was denied on July 23, 1990 without addressing the constitutional question therein. ... Appellant now adds this issue of disqualification and the constitutional challenge of CCP §170.4(b) to this appellate brief. Rather than repeat the arguments presented in the petition (B051586), appellant hereby refers this Court directly to the petition on this issue of disqualification for purposes of this appeal. ... Plaintiff went on to state "Plaintiff objects to the arbitrary use of CCP §170.4(b) by a biased and prejudicial judge, to defeat the purposes and objectives of the disqualification procedure.' [CT 1007:28 - 1008:8]. Nevertheless, Judge Fields

failed and refused to acknowledge the ground stated on the face of the SOD [Statements of Disqualification]." [SB 51-52, 55].

[APP.28]: "Appellant stated in his petition (Case No. B051586) 'Unless this appellate court offers immediate relief by setting aside and vacating the July 6th order [CT 739], and ordering that Judge Fields either be disqualified, or ruling that he is deemed to have already consented to such disqualification by having failed to consent or submit a written verified answer to the charges pursuant to Code of Civil Procedure §170.3(c)(4), petitioner will be irreparably harmed by the denial of a fair and impartial trial and pretrial proceedings, which will deny him an opportunity to be heard at a meaningful time and in a meaningful manner in violation of due process of law. ... Relief being denied under extraordinary remedy July 23, 1990, appellant now challenges through direct appeal the constituticnality of CCP §170.4(b) as it was applied to him as a denial of an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., procedural due process." [SB 57].

Plaintiff went on to fully brief the law regarding the requirements of procedural due process in the State courts and the law regarding the disqualification procedures, closing with the statement "CCP §170.4(b) is unconstitutional as it was applied to appellant in this case." [SB 57-61].

[APP.29]: "...Appellant stated that he filed for mandamus on July 16, 1990, citing the case number, and that it was denied on July 23, 1990 ***without addressing the constitutional question raised therein.*** [emph. added]. He then cites from CCP §170.1(c) which provides that at the request of a party, an appellate court shall consider whether it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." [SB 52]. Appellant makes such request in this appeal and brings the constitution-

al challenge of CCP §170.4(b) which ***remains unaddressed.*** Appellant referred this Court directly to the petition in Case No. B051586 rather than repeat those arguments again. [SB 52]. Since appellant was denied extraordinary relief, his remedy is now by means of ordinary relief in this appeal.... The Second Statement was decided with the final judgment. Obviously, there was no need to file for extraordinary relief of mandamus when the entire case was already on appeal by ordinary relief. It fell to the jurisdiction of the appellate court as a matter of course. Appellant waives none of his arguments on both the first and second Statements of Disqualification." [RB 1-2].

[APP.30]: "Because of the misapplication of the disqualification statutes unilaterally by Judge Fields on two separate occasions, allegedly denying appellant an opportunity to be heard at a meaningful time and in a meaningful manner in violation of due process of law, appellant challenged the constitutionality of Code of Civil Procedure §170.4(b) as applied to him in this case [SB 57]. The due process violation described pertains to the obstruction of a judicial remedy in state court by Judge Fields' refusing to recognize this case as a state tort action [SB 57] and his misapplying and abusing the disqualification process [SB 59-60] to avoid addressing his failure to administer the remedy to which appellant is entitled within the meaning of CCP §§20 and 187. An essential element of procedural due process is an impartial judge [citation] who will grant an opportunity to a fair hearing and provide the judicial remedy required by law. The disqualification issue, including the challenge of constitutionality, goes to the issue of ***remedy*** in this state action and must be addressed on this appeal." [REH 8-9].

[APP.31]: "Third incident of obstruction of justice (Refusal to address Disqualification): ...Judge Fields followed the COUNTY's dictates to a "T", refusing to obey the law in order to do so.

Because of this misconduct by Judge Fields, striking blows at judicial redress under the State tort laws, petitioner filed two separate Statements of Disqualification against this lawless judge.... Notwithstanding CCP §170.3(5) which provides 'No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In every such case, the question of disqualification shall be heard and determined by another judge...', both Statements were unilaterally disregarded (stricken) by this lawless judge whose misconduct was under question, and never thereafter was petitioner heard.

"Petitioner pursued his remedies first by petition for writ of mandate on his first Statement which petition was summarily denied [i.e., ***no hearing***] and then on appeal from final judgment on both Statements. [Plaintiff had already argued that mandate isn't necessary if final appeal is available]. The challenge on the second Statement didn't come to fruition until the final dismissal of the case and so was brought up for review as part of the appeal from final judgment (that issue appearing as part of the final order being appealed under CCP §904.1(a)). Petitioner has been summarily denied all rights to be heard and then denied all rights to review.... Judge Fields' misconduct consisted of acting in excess of the court's jurisdiction, violating statutory law and making successive void decisions. However, instead of administering appellate review, Justice Nott refused to even mention the existence of the issue of disqualification of Judge Fields, thereby foreclosing petitioner's judicial remedy in superior court in the underlying tort action. ...

"Involved in the appeal was the challenge of the constitutionality of CCP §170.4(b) as applied, since Judge Fields unlawfully used that statute as a means to deprive petitioner of an opportunity to be heard at a meaningful time and in a meaningful manner, or at all, in violation of due process of

law. A right to be heard is a basic right in American Jurisprudence, and ***cannot be shut out.*** This issue goes to ***redress*** within the California courts, and by the refusal of Justice Nott to even discuss the matter on review, petitioner's remedy in the State court system has been foreclosed...." [Reply to Ans.to Pet. pp 8-10, excerpts].

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